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INTERNATIONAL LAW

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INTERNATIONAL LAW

PART I

PEACE

By

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PREFACE.

THIS volume, and that on war which it is hoped will follow it, are not intended as an encyclopaedia of international law. The aim has been to give a knowledge of the most important topics to English university students and average Englishmen interested in public affairs, neither of them a class which can devote very much time to a single science, and to put them in a position to appreciate the discussions on other topics as they arise in the foreign affairs of the country.

We have not attempted a deductive treatment. Such a treatment might start from state sovereignty or from the assertion of certain rights as inherent in a state, but it would lead in many cases to the admission of clashing sovereignties or rights, that is to no result, unless the starting-points were defined with a precision only attainable by embodying the conclusions in them. International sovereignty and rights are the growth of recent centuries, and the very object of our science is to ascertain the point at which they now stand. Some of the earlier stages of that growth were assisted by theories of a law of nature and nations, of which what is good survives under the name of justice, a ground more solid but less capable of being systematised, while the attempt to transfer wholesale to associations what is true of natural individuals was bound to fail.

We have not treated *ex professo* of the history of international law, though much of it appears in the discussion of particular topics. It is idle to discourse of the history of a science to those

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who are only beginners in the science itself. If this volume and the contemplated one on war should be followed by a volume dealing with topics unsuited to the introductory character of their predecessors, it would be natural that the history of international law should be one of them.

We quoted Mr Hall's excellent treatise on our subject by §§, hoping that this might be more convenient than quotation by pages to those who should use a different edition. Unfortunately the last edition, which appeared while this volume was passing through the press, omits the division into §§.

Our thanks are due to the proprietors of the International Journal of Ethics for permission to reprint the article on International Arbitration.

J. WESTLAKE.

25th August 1904.

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CHAPTER I.

GENERAL VIEW OF INTERNATIONAL LAW.

Definition of International Law.

International Law, otherwise called the Law of Nations, is the law of the society of states or nations. In this we have to make clear what is meant by states or nations, their society, and law.

States, Nations, Nationalities.

It is the experience of every man of European blood that he lives in a state, which in its turn lives among states. We Britons are subjects of a state called the United Kingdom, equivalent for international purposes to the British dominions, and this in its turn lives among a number of states including, for example, France, Germany, and the United States of America. Each of the states which have been mentioned has two remarkable characters. On the one hand it is the largest or highest and most comprehensive unit in which law and authority are applied to individual men by courts of justice and officers of government. The duty of an individual to answer for his actions and to obey is enforced by a scale of courts and authorities ascending to the highest British, French or other, and there it stops. There is no international court or authority to which an individual is responsible. On the other hand each of the states mentioned has relations with other states, such as peace, war, treaties, arbitrations and so forth. These two characters do not always go together. Take for

example Austria-Hungary, composed of the empire of Austria and the kingdom of Hungary, each having final authority over its subjects, but neither having separate relations with states outside the composite whole which they form, the only relations entertained by them with outside states being those of Austria-Hungary as a single state. A state which has relations with the outside world, whether it be single, as the United Kingdom, France, and the United States of America, or composite as Austria-Hungary, is and is called a state of international law. A political body which, as such, has no relations with the world at large, but is a supreme unit to individual men, such as Austria or Hungary separately, is not a state of international law, yet cannot be denied a proper claim to the name of a state.

But there are instances in which the name "state" is used of something which does not possess either of the two characters in question. Thus the component so-called states of the United States of America and of the Commonwealth of Australia, by the constitutions of the larger bodies of which they are members, on the one hand are not in all respects supreme over the individuals belonging to them, and on the other hand are not permitted to have relations with any states outside those larger bodies. The original components of the United States of America, as Massachusetts and New York, became states of international law when they won their independence, but since by the terms of their union they have lost both the possibility of foreign relations and even complete supremacy at home, the name of state has been retained by them only as a memory. In the Australian Commonwealth the name is not even a memory. There the parts, as New South Wales and Victoria, have always been included in the British dominions, and have now received the name of state by way of compliment, no doubt suggested by the American instance, in which also the members admitted from time to time, as Kentucky and Ohio, are put on a par with the original members by receiving the complimentary name of states.

Thus the word "state" is used for three different kinds of political bodies, states of international law, states which are supreme over their subjects though not states of international

law, and so-called states which are not even entirely supreme over their subjects. The two former may however be called states proper, and we shall always assume that the states we speak of are states proper, unless it is otherwise expressed. The context will show whether a state of international law is intended.

We further see by reference to our common experience that a state proper is an ideal body, which on the one hand has a certain territory, and on the other hand is a society composed of individual men as its members, and having a corporate will distinct from the wills of its members. And a little reflection will show us that since the individual men associated in the state are moral beings, and the action of the state which they form by their association is their action, the state must also be a moral being, having a responsibility and a conscience which are the summation of the responsibilities and consciences of its members. In this character of a moral being, having a corporate will, responsibility and conscience, a state is capable of being a subject of law and having rights.

The individual members of a monarchical state are distinguished as the sovereign, a title always given to the monarch, and his subjects, though the latter are also subjects of the state, and are often spoken of as such. The individual members of a republican state are called its citizens, and are in truth subjects of the state although not commonly called subjects. All the members of a state, whether sovereign, subjects or citizens, are denoted by the convenient name of its nationals. When a state has an autocratic ruler for its sovereign it might be thought at first sight to have no corporate will distinct from his will; but in truth, even then, its corporate will appears as distinct in the rules which determine the succession or election of the autocrat, and in the rule which makes it the duty of all the other members of the state to obey him. Sometimes an autocrat has decreed a change in the rules of succession, but such cases must be regarded as revolutionary, and where the autocratic decree is ultimately obeyed, which does not always happen without civil war, the corporate will of the state reappears as distinct in the acceptance, immediate or ultimate, of the new rule.

A nation, as the word is used in the term "law of nations"

and generally in the language of international law, means a state considered with reference to the persons composing it. Such also is the usual meaning of the word in the English language when civilised people are spoken of. When we speak of the British nation we mean the British state considered from every point of view but that of its territory. Even when uncivilised people are spoken of as nations, the term sets them before us as possessing such organisation as they are capable of. A nationality on the contrary is a mass of individuals who, whether organised as a state or not, are grouped together by their consciousness of possessing common characters comparable in nature and importance to those which are usually possessed in common by the nationals of a state. Hence nationalities often aspire to be separate states, but by no means always. Some nationalities are content with a limited degree of political separateness, and others do not aspire to any political recognition but are content with the self-conscious feeling, which may be a useful stimulus to exertion in self-culture and the pursuit of reputation.

What are or may be the characters of a nationality cannot be said more precisely than has been said above by comparing them to those of a nation, because nothing general can be affirmed about common characters possessed by the members of a nation. There are many instances in which the boundaries of states cut across common characters without giving rise to any demand for political redistribution. We can only say that whatever unites a nation in feeling, or contrasts its members with those of other nations, may serve as the basis for a nationality. Such characters are language, religion, temperament, the possession of common memories, the entertainment of common political or social beliefs or aspirations. Another is race, which is often put in the forefront, but the different races of white men are not so definitely distinguished from one another as what in natural history are called varieties. They are continually being modified by circumstances similar to those through which they arose out of a common stock, such as climate, food, and the effect of habits and institutions both on the moral temperament and on the physical structure; and they are continually being blended by mixture of blood, through conquest and emigration.

Community of language and temperament in a population often causes a belief in its being or belonging to a distinct race, although its physical peculiarities may fail to mark it off as distinct or to identify it with the race to which it is supposed to belong, and its history cannot be traced far back without encountering evidence of blending. In fact the indefiniteness and instability of all the characters on which nationalities are based are a conclusive objection to founding international rights on nationality, as was proposed by many eminent Italian jurists at the time when the unity of their country was being achieved. Nationalities, though often important in politics, must be kept outside international law.

Law, National and International.

Laws may be divided into laws proper and laws metaphorical. The best marked examples of laws proper are those of a state, and the circumstance that these apply uniformly to all the cases which fall within their formulas is the foundation of the metaphor by which the name of law has been extended to those of nature, for the laws of nature tell us that in given circumstances certain other circumstances will uniformly be also present or follow. Thus the law of gravitation is that, given two particles of matter, they will uniformly, that is to say in all cases, attract one another according to the law of the inverse square. But outside the element of uniformity the contrast is complete. The laws of nature express what is: the universe is constructed on a system of which the law of gravitation is a part. Laws proper express what is to be done: contracts are to be observed, certain conduct is to be avoided on pain of punishment. The laws of nature cannot be broken: an instance breaking an alleged uniformity would prove that the supposed uniformity, or so-called law, did not exist. Laws proper are broken whenever that which they direct is not done, and are not the less broken although the breach may be redressed or punished.

The typical instance of law proper is, as we have said, the law of the land, or national or state law, often called municipal

law, although that name ought to be avoided, because municipalities within a state have their own subordinate laws to which the name municipal law is appropriate. The law of the land emanates from the corporate will of the state, which is manifested both in the particular commands which any officers of the state may be empowered to give, and in certain uniform or general rules. Its manifestations of the latter kind are made, first, through the law courts, which declare the corporate will in case of doubt or resistance, and are expected to declare it uniformly in the cases which come before them; secondly, through the executive machinery which enforces the judgments of the law courts; and thirdly, in the way of legislation, by enacting statutes as general rules for the guidance of the law courts, or by enforcing, and so adopting, the general rules on which the law courts proceed. Whether enacted or tacitly adopted these general rules are the law of the land, the national or state law, the law of the state society.

Now when international law is claimed as a branch of law proper, it is asserted that there is a society of states sufficiently like the state society of men, and a law of the society of states sufficiently like state law, to justify the claim, not on the ground of metaphor, but on the solid ground of likeness to the type. In order to see whether this is so, let us take some examples of rules prevailing between states. It is a rule that a foreign crowned head is not subject to the jurisdiction of the law courts of a state of which he enters the territory, although much may be said for the opinion that he ought to be subject to it. Again, it is a rule that the commerce of a neutral state in time of war may be interfered with by the belligerents on the grounds of breach of blockade and carriage of contraband of war, although much may be said for the opinion that the commerce of a neutral ought to be exempt from all interference by the belligerents. A state which attempted to defy those rules, however honestly convinced it might be of the wisdom of the contrary opinions, would find itself practically unable to do so. It would practically be like an Englishman who should try to defend an action for the price of goods by saying that he was honestly convinced that such an action ought to be barred in three years instead of six, which is also

an opinion for which much may be said. A state trying so to act would find itself met by a real compulsion, not indeed applied through law courts and an executive, like the compulsion within a state, but through the action of individual states, upheld by the general sentiment and sufficient to prevent such attempts being made. Accordingly the facts are that:

(1) The general opinion of states approves certain rules, not as expressing conduct to be recommended without being enforced, like telling the truth or being charitable, but to be enforced by such means as exist.

(2) The conduct directed by those rules is in fact generally observed by states, and that, not as freely choosing it in each instance, but as obeying the rules; not necessarily from fear of enforcement, but at least from the persuasion that the rules are law.

(3) Such observance so greatly promotes the tranquillity of the world that a duty of observance, correlevant to the benefit enjoyed, is laid in conscience on states, at least in ordinary cases. There are rare cases in which it is right to disobey even the law of the land with a view to bringing about its amendment, but where the contact between a number of individuals is close, as it is between states, settled rules, even though not the best, are at least provisionally better than none.

These things being so, states live together in the civilised world substantially as men live together in a state, the difference being one of machinery, and we are entitled to say that there is a society of states and a law of that society, without going beyond reasonable limits in assimilating variant cases to the typical case. As is fitting in a science dealing with living subjects, in which there is always so much shading off, we have not made the classification of law depend on a verbal definition like those of geometry, but have followed the practice approved in natural history, in which classifications are founded on likeness to types. In doing so, we have been able to keep in touch with the common English usage, which does not hesitate to give the name of laws to the rules of all societies in which obedience is enforced by the regular or irregular action of their members. To the same effect is the old saying, *ubi societas ibi jus est.* And

we have regarded our subject exactly in the light in which it is placed by Hall, who says:

"International law consists in certain rules of conduct which modern civilised states regard as being binding on them, in their relations with one another, with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement." *Treatise on International Law*, p. 1.

Austin's Limitation of the term "Law."

The denial of the name of law to our subject is principally connected in England with the name of John Austin, who taught that law is a general command given by a superior, individual or composite, to the persons who habitually obey him. All other senses of "law" he regarded as improper or metaphorical.

In order to bring national law within so narrow a description he had to pick out among the members of a state the one or more persons in whom, by its constitution, the law-making power is placed, and to treat the law of the land as the body of general commands issued by him or them, and obeyed by the other members of the state as well as by himself or themselves when not acting in the law-making capacity. The law-makers or superior he called the real sovereign, and he and his followers have shown much ingenuity in pointing out what persons constitute the real sovereign under the constitutions of various countries.

Since the society of states has no sovereign over it, and is at best very ill-organised, Austin could find in it no such superior and inferiors as his description of law demanded. Therefore what is commonly called international law he proposed to call positive international morality. By positive, he meant what in jurisprudence is commonly meant by that term, namely that the rules so described are sufficiently enforced and observed to have an objective existence, but by making them a branch of morality as distinguished from law he ran counter to the received use of the latter name, and his nomenclature failed to mark that the subject is connected with justice as a special

branch of morality, and that other ethical duties remain incumbent on states though outside the rules in question.

Continental Nomenclature.

We have seen that the leading idea which determines the use of the English word "law" is enforcement through the action, regular or irregular, of a society. The connotation of right is absent from the word. We can say that a law is unjust, or wrong, which is the contrary word to right, and ought to be altered, without questioning or impairing its character of law. But the words which in Latin and the continental languages correspond most nearly with "law"—*jus*, *droit*, *recht*, etc.—have something of the meaning of "law," but they also and principally mean "right," and carry a suggestion of that meaning into any use which may be made of them in jurisprudence. Any suggestion of enforcement, or of positive or objective existence, which they may carry with them, is so weak that when intended to be dwelt on it has to be enforced by suitable words or by the context. In such expressions as *le droit français* or *das deutsche recht* the notion of positiveness is included because the law of a country is strictly enforced, and the notion of right is excluded because right is not limited by frontiers. But the expressions *le droit international* or *das völkerrecht* rather suggest a system embodying right, so that you could not properly say of its rules that they are unjust or wrong and ought to be altered, as you can of the rules contained in a system described as international law. The system is placed on the level of what in English we call law by the qualification "positive"—which Austin employed, only in connection with morality instead of law—or by the qualification "European," which carries the suggestion of positiveness much as *français* carries it in *le droit français*. And so the full translation of "international law" is *le droit international positif* or *das positive völkerrecht*, to which *le droit international Européen* or *das Europäische volkerrecht* are equivalent expressions.

Of course, on the continent as well as in England, statesmen and writers must often refer to received rules, and often in

doing so sacrifice something to brevity. It must not therefore be supposed that an abstract right is always intended when *le droit international* or *das positive völkerrecht* is mentioned. But, on the other hand, no care that can be practically looked for can entirely eliminate the effect of the assumptions which are tacitly made in the language used. Hence some confusion necessarily arises, but on the whole we may say that the different connotations of "law," on the one hand, and of *jus*, *droit*, etc., on the other hand, cause a difference between the English and continental modes of looking at our subject. In estimating the mutual obligations of states an Englishman appeals primarily to international law, as a body of rules considered with regard to their reception. He may make some allowance for the desirableness of their being improved, and may occasionally justify, as a matter of conscience, disregarding them with a view to bringing their improvement about. A continental, especially if he is not a statesman obliged to deal with facts, appeals primarily to *le droit international* or *das völkerrecht* as a standard of right independently of its reception. He may make some allowance for practice, but on the whole received rules count for less with him than with us, and what he considers to be justice counts for more, though he is thereby exposed to the risk that even in good faith he may mistake his interest for the measure of justice.

It must however be borne in mind that, even from the English point of view, the received or positive rules must not be treated as isolated ones, but must be co-ordinated, and their application must be controlled by the science of jurisprudence. That science teaches principles and a method which are common to all law proper, and that the rules received between states are susceptible of such treatment and require it might have been mentioned as another point in which they are comparable to the law of the land. And this circumstance tends to bring English and continental views about international obligations into greater harmony than the contrast of meaning between "law" and *droit*, or *recht*, might at first lead one to suppose. For, true as it is that *droit* and *recht* mean "right," still they do not mean right in the unlimited sense which that term oftenest bears in English, namely what commands moral

approval on whatever ground, but right in the special sense, not altogether foreign even to the English term, of that which is required by justice. Thus a continental thinker has to distinguish his *droit* or *recht* from conduct which he would approve on the ground of generosity, temperance, or any other virtue than justice; and in doing so he has to employ principles and methods the same or akin to those of jurisprudence. Thus the difference between English and continental thought on the mutual obligations of states is attenuated but not destroyed.

The Law of Nations.

We have now considered separately, first the word "nation," to which in this subject *gens* in Latin, *volk* in German, and so forth are equivalent, and secondly the words "law," *droit*, and so forth. A few remarks are now necessary on the combination of those words in the phrases "international law," *jus gentium*, "law of nations," and so forth; though it is not our intention in this chapter to enter at any length into the history of international law. Whatever may have been the manner and date of the introduction of what was called the *jus gentium* into the private law of Rome, it is certain that at least from the time of Cicero *jus gentium* was understood to mean those principles of right—right in the special sense of justice—in which all the nations with whom the Romans had dealings were agreed; *jus naturale* was understood to mean those principles of right which were recommended by a philosophical view of the nature and situation of man, and these two were believed to coincide because it was thought that only nature could be the cause of so general an agreement. Thus Gaius says that *jus gentium* is "what natural reason establishes among all men[1]." This view of principles extended to public as well as to private relations, on many points in both of which the nations known to the Romans were agreed. Thus Pomponius relates that in a case where ambassadors were at Rome at the time when war was declared against their nation, it was determined that they remained free in accordance with the

[1] Gaius, 2, 65; 1, 1; Just. *Inst.* 1, 2, 1.

jus gentium[1]. Ulpian however, noting that some legal institutions are based on natural facts common to men with other animals, defined *jus naturale* as "that which nature has taught all animals, and from which come the union of male and female called by us marriage, and the procreation and education of children[2]." Justinian adopted that definition from him, and thenceforward the names *jus naturale* and *jus gentium* were used to denote different sets of rules. No one indeed seems again to have based a classification on the difference between facts common to all animals and those peculiar to man, but the habit of identifying *jus gentium* and *jus naturale* was broken, and new lines of demarcation were found between them. In the seventh century Isidore of Seville, enumerating the subjects comprised in *jus gentium*, mentions only such as belong to international law, with the single exception of prohibitions to marry foreigners; principles of national law which are common to all nations fall into his *jus naturale*. His definitions were generally copied during the middle ages, but with the revival of learning the classical use of *jus gentium* and *jus naturale* was revived, the one for the principles of right, whether public or private, accepted in the world contemplated by the particular writer, and the other for the principles of right taught by nature; but the classical identification of those principles was not revived. On the one hand a wider knowledge of the world had disclosed that none but the simplest principles receive a really universal assent, and with the failure of universality the old argument for a natural origin failed also. On the other hand new philosophical views questioned the natural origin of some things which were generally assented to in the world to which the European writers belonged, and it thereby became necessary to refer those things to human will. So it came about that Grotius described *jus gentium* as that law which has received its obligatory force from the will of all or of many nations[3], and devoted his famous treatise to ascertaining by the testimony both of facts and of authorities what that law prescribed in the case of

[1] Lib. xxxvii ad Quintum Mucium, in *Dig.* 50, 7, 17.

[2] Just. *Inst.* 1, 2.

[3] *De Jure Belli ac Pacis*, 1, 1, 14.

international relations, and to discussing the corrections (*temperamenta*) which might reduce it to the measure of the natural law as modified by the Christian principle of love to one's neighbour. The corrections which he demanded have been largely realised, as well as others of which he did not dream, and yet more are needed to perfect international relations.

Hence the *jus gentium* of Grotius, considered as a term of classification and not confounded with the particular rules which he classified under it, is equivalent to *le droit positif des nations* or *das positive völkerrecht*, and in English would be sufficiently rendered by "law of nations," to which the addition of positive is unnecessary, law being always positive. If combined with the corrections or *temperamenta* thought by the particular writer to be necessary to bring it into accordance with right, it would become simply *le droit des nations* or *das völkerrecht*, though we should have to call it the ideal law of nations. In every way "law of nations" and "international law" are equivalent terms, and so are *le droit international* and *le droit des nations* or *das völkerrecht.*

CHAPTER II.

THE SOURCES AND PRINCIPLES OF INTERNATIONAL LAW.

The Sources of International Law: Custom, Reason, Roman Law.

Custom and reason are the two sources of international law.

Custom must not be confounded with mere frequency or even habit of conduct. In any state or other society in which customary law is admitted, custom as a part of law means the conduct which is enforced as well as the strict or loose nature of the society allows—not always very well, even in the case of national law in the ruder stages of national existence—and which is followed as well from the fear of such enforcement as from the persuasion that the received rule requires such conduct to be followed. In other words, custom is that line of conduct which the society has consented to regard as obligatory. We have seen that international law is law just because the conduct which it directs has the character thus described, so that for custom to be a source of international law follows from the definition of each. Even for those who seek for international right—*le droit international* or *das völkerrecht*—custom must be a source of such right so far as the existence of the custom carries a presumption of its reasonableness, and so far as in ordinary cases there is a duty of conscience to follow it at least provisionally until it can be amended.

Reason is a source of international law not only for the seekers after international right, who will appeal to reason as a

check on custom, but for all, and for two causes. First, the rules already regarded as established, whatever their source, must be referred to their principles, applied, and their principles extended to new cases, by the methods of reasoning proper to jurisprudence, enlightened by a sound view of the necessities of international life. Secondly, the rules as yet established, even when so applied and extended, do not cover the whole field of international life, which is constantly developing in new directions. Therefore from time to time new rules have to be proposed on reasonable grounds, acted on provisionally, and ultimately adopted or rejected as may be determined by experience, including the effect, not less important in international than in national affairs, of interest coupled with preponderating power.

With both custom and reason in our subject Roman law is so intermixed that its position requires a separate notice to make it clear. Modern international law arose at a time when the larger part of the world was subject to monarchical rulers with whom their states were identified, and the Roman law was held to apply between such persons as being the law common to them. The states of other than monarchical constitution which had dealings with monarchs or with one another would have had to submit to the rules which naturally existed in the more general case, even if, by claiming rights as moral beings, they had not brought themselves under the Roman law as the one code then deemed to be obligatory on moral beings. The rules which flowed into international law from this source are now incorporated with the customary law of nations, and such is the respect still generally entertained for the Roman law, which has been called written reason, that this part of the customary law is never controverted even by the seekers after international right, although it may be the subject of some of the controversies which are waged about the interpretation of texts. Further, in applying to international law the methods of reasoning which belong to jurisprudence, it is the reasoning of Roman law that has been applied, that system being common not only to the continent of Europe but also to the English Court of Admiralty.

The Evidences of Custom in International Law.

On the evidences of custom in international law I will take the liberty of repeating what I have said elsewhere.

"The consent of the international society to the rules prevailing in it is the consent of the men who are the ultimate members of that society. When one of those rules is invoked against a state it is not necessary to show that the state in question has assented to the rule either diplomatically or by having acted on it, though it is a strong argument if you can do so. It is enough to show that the general *consensus* of opinion within the limits of European civilisation is in favour of the rule.

"The best evidence of the consent which makes international law is the practice of states appearing in their actions, in the treaties they conclude, and in the judgments of their prize and other courts, so far as in all these ways they have proceeded on general principles and not with a view to particular circumstances, and so far as their actions and the judgments of their courts have not been encountered by resistance or protest from other states. Even protest and resistance may be too feeble to prevent general consent being concluded from a widely extended practice." The increasing frequency of international arbitration now calls for the special mention, among the evidences of this class, of the judgments of arbitrators, particularly of such as may be given by the court established in pursuance of the Hague Convention of 1899, to which practically all states of international law are parties.

"The arguments adduced by statesmen in despatches and other public utterances are very important as showing what were the principles proceeded on, especially in the case of treaties, which are so often concluded with a view to particular circumstances that great care must be taken in using them as evidences of international law.

"Special authority is often claimed for the practice of those states which are most concerned with a particular branch of international law, as for that of the chief maritime powers with regard to the laws of maritime war. There is a good foundation

for such a claim in the fact that the powers most concerned w a subject must understand it best, and be best able to distinguis good from bad reasoning about it. On the other hand, special knowledge is often accompanied by the bias of special interest. But when the states most concerned with a subject in turn apply the same rules and suffer their application, that bias may be supposed to be eliminated, and the agreement which those concerned in the vast majority of cases find suitable must count for a general agreement in spite of much comparatively speculative criticism from other quarters.

"The opinions of private writers must of course be counted towards the general consent of men, especially when the writer's reputation proves that he represents many persons besides himself. Moreover, for much of international law, which is so well observed that discussions about it between states are not easily quoted, its admission into accredited text-books is valuable testimony to its being observed as law, and not from any option still remaining free to states. And when a rule is disputed, or there is a question whether an old rule ought to be changed or a new one introduced, it is only through public discussion that reason can be made to appear and prevail.

"Time cannot supply the want of general agreement, but where the agreement in favour of an altered or added rule is sufficiently general, it is an element in determining the limit of the forbearance to be shown to a state which persists in resisting the change or the addition. When reasoning has stood the test of time, it can be no longer urged that it resulted from caprice, or from the undue consideration of a transitory interest."

Maxims on the Obligation of Received Rules and on the part of Reason in International Law.

On the part of reason in international law, and on the obligation of received rules, which is closely involved with the question of the true part of reason, I have said the following elsewhere.

"International rules ought to be made with due care that they shall not restrict liberty more than is necessary, that they shall be suited to the cases which most commonly arise, and that reciprocity in their application shall be possible. It is no reason for not applying a rule that a different one would have been better suited to the particular case.

"In matters transcending the state tie, and so far as a rule founded on the consent of a society is wanting, the men who guide the action of states have only to obey their consciences. The want of a rule to define the action allowable does not exclude all action. The largest field for the application of this principle is in dealings with states or populations not having the civilisation necessary for forming part of the international society, but the principle is sometimes applicable between states included in that society.

"When a state has to act although a rule is wanting, it ought as far as possible so to act that a rule might be framed on the precedent.

"The obligation of international rules on the conscience, even when they have once been founded on a general *consensus*, is subject to exception, as is the obligation of state law on the conscience. And in the former department the conscience will have a somewhat greater latitude than within a state, because there is no international legislature, and diplomatic agreements for the change of a rule can with difficulty be made to comprise so large a number of states as to prove that the general opinion has been changed; wherefore an international rule can rarely be changed otherwise than by its ceasing to be followed and general approval being given to such change of practice, of which some state must set the example. Hence it is not a conclusive, though a strong, argument against a state that it has itself applied the rule of which it resists the application. It would be contrary to the moral nature of man that he should be fettered, absolutely and permanently, by any external rule.

"When a state is confronted by a rule which it deems to be bad, either originally or because it has become bad through a change of circumstances, it ought to take into account the greater or less evil which always results from violating known

rules, and, if it decides to violate the rule in question, it ought as far as possible so to act that a better rule may be framed on the precedent. Neither in violating a rule nor in acting where a rule is wanting is a state at liberty to consider only its particular case, without reference to the conduct which would be best suited to the cases which most commonly arise[1]."

[1] The quotations in this and the preceding section are from *Chapters on the Principles of International Law*, Westlake, 1894, pp. 78—85.

CHAPTER III.

THE CLASSIFICATION OF STATES.

International law being the law of the society of states, we have next to consider what varied phenomena of state existence may be presented by states of international law.

Independent or Sovereign States.

Independence means freedom from control, and a state like the United Kingdom or France is independent because it is free from all control either over its internal government or over its foreign relations. Such a state is also called in international law a sovereign state, a term of which the explanation is historical. It has already been observed, in speaking of the debt which international law owes to Roman law, that in the late middle age and early renaissance periods most of the important states were under monarchical government, and their monarchs, who by their internal constitutions were called sovereigns, were identified with them in their foreign relations. To this day, when a treaty is concluded by a monarchical state, it is its sovereign—whether his title be emperor, king, grand duke or any other—that is named as the party to it. Hence the rules of international law were regarded as existing between sovereigns, and republics had for the purpose of those rules to be ranked as sovereigns. Hence again to be an independent subject of the rules of international law, or an independent member of the international society, became equivalent in the

language of our science to being sovereign; and as the notion of the state distinct from its rulers was drawn out into greater clearness, international, which may also be called external, sovereignty came to be regarded as an attribute of the state without reference to its form of government. It is therefore altogether different from the internal sovereignty of the king or other head of the state, where a head with the title of sovereign exists, and for English readers it may be useful to add that it is also different from the sovereignty imagined by Austin as belonging to the persons in a state who have the law-making power. But since the sovereignty of a monarch implies supreme government, and an independent or internationally sovereign state has the supreme government over its territory, and to some extent over its subjects wherever they may be, the different uses of the word "sovereign" are sufficiently analogous not to offend against propriety of speech.

Dependent or Semi-Sovereign States.

It is not necessary for a state to be independent in order to be a state of international law. That a state should be subject to limitation or to the control of another state in its internal government and yet be free in its foreign relations is scarcely possible, but it often happens that a state which is subject to the control of another state in its foreign relations, or which can take international action only to a limited extent, is more or less free in its internal government. Such a state is in a position different from New York or Victoria, because its foreign relations are its own though controlled or limited, but it is dependent or inferior, while the state which controls its foreign relations, or the federal body which limits them, may be called its superior. It may be supreme over its own subjects, but not being an independent member of the international society it will not be externally sovereign, and its position is described as one of semi-sovereignty. In that term all the possible forms and degrees of dependence are included, and it has therefore been proposed to substitute for it part-sovereignty, which in strictness would be more correct; but the change is unnecessary,

since no one will suppose that "semi-" implies an exact half, or that any quantitative division of sovereignty is possible.

What is essential to observe is that for every part of the population and territory of the civilised world the full powers of a sovereign state must exist in some quarter. That must be so, not only for the benefit of the population and territory in question, but also for that of the rest of the world. Foreign states must be able to find some ultimate depositary of power with which to deal for the settlement of the affairs that may interest them in connection with the given region, whether in seeking redress for wrongs or in making international arrangements. Therefore whatever elements of external sovereignty an inferior state may lack must belong to its superior, whether that be a single state controlling its foreign relations or a federal body limiting them.

Independence, unlike sovereignty, cannot be qualified as "semi-" or described as partial, because it negatives dependence and negatives admit of no degrees. When it is desired to point out that an inferior state has a political existence separate or distinct from that of the superior, it should be described as a separate or distinct state, not as an independent one.

Protectorates.

One form in which dependence or semi-sovereignty occurs is that of protectorates. In some of these the protected state is left free from interference within its own territory, while in others a certain authority is given within its territory to the protecting state, but in all it is arranged that the former shall enter into no treaty or have any diplomatic intercourse with outside states without the consent of the latter, expressed or inferred as may be stipulated, and any contrary attempt at such treaty or intercourse is regarded by the protecting state as a hostile act against it on the part of the outside state concerned as well as on the part of the protected state. It is not necessary that the name "protectorate" shall be used in the arrangement. The fact that the inferior state is not free to seek aid and alliances elsewhere will of itself impose on

the superior the duty of protecting it against wrong, and the fact that outside states are not free in their choice of methods for seeking redress from the inferior will impose on the superior a responsibility for the wrongs committed by it. That responsibility will in its turn give to the superior state the right to control such action of the inferior as might involve it, and even express provisions for the freedom of the inferior in its internal affairs must be interpreted as being subject to that right.

A protectorate must not be confounded with simple protection, which one state may bind itself to give to another without impairing the latter's capacity for action in foreign affairs. An example of that kind is furnished by the little republic of San Marino among the Apennines, which from the beginning of the seventeenth century enjoyed the protection of the Pope under a formal treaty, and which from 1862 has been taken under "the exclusive protective friendship" of Italy, but which has a *chargé d'affaires* at Paris, and consuls in various places of Italy, France and Austria[1]. Another example was formerly that of the principality of Monaco, protected at different times by Florence, Spain, Savoy, France and Sardinia, but which practically renounced the protection of the last named, or of Italy into which Sardinia expanded, by ceding a portion of its territory to France without Italian concurrence, and now stands unprotected in the enjoyment of the remainder[1]. The position which Napoleon I assumed towards the short-lived Confederation of the Rhine was also nominally one of simple protection, though he was really its master[1]. It is little likely that such cases will be multiplied in future: the power which promises protection will generally require an equally formal recognition of the corresponding rights, which will turn the relation into a protectorate.

A standard instance of a protectorate was that of Great Britain over the Ionian Islands, which by treaties of 4 Nov. 1815 between England and Russia, Austria and Prussia, were declared to form a free and independent state under the immediate and exclusive protection of the king of Great Britain and Ireland. This was a signal abuse of the word "independent," but the republic so

[1] All these instances are mentioned in 2 Rivier 92.

established lasted till 1863 when the Islands were annexed to the kingdom of Greece. Internally the whole of the executive authority was practically in the hands of a British commissioner, and the republic could neither accredit nor receive diplomatic representatives, nor could it accredit consuls although it received them, the protecting power exclusively representing it abroad. On the other hand, the treaties of Great Britain did not affect the republic unless the former expressly stipulated for it as the protecting power, its vessels carried a separate trading flag, and the British Court of Admiralty decided that it was neutral during the Crimean War, in the declaration of which by Great Britain it had not been named[1]. Among the protectorates now subsisting, two of the most important are those of Great Britain over the sultanate of Zanzibar and of France over Tunis and its bey. The so-called protectorates over uncivilised regions in which there is no state to be protected, which have been assumed by Great Britain and other powers and which are treated of under that name in the General Act of the African Conference at Berlin, have nothing but the name in common with the state relation now under consideration. They have been called colonial protectorates, and will be explained in connection with the acquisition of territory, to which head of international law they properly belong.

The question has been raised whether an armed contention between two states whose relation to one another is a true protectorate is a war or a rebellion. The answer appears to be that the distinctness of the two states makes a war of the most regular kind theoretically possible between them, and that the war of 1895 between France and Madagascar was such an actual case; but that if by the arrangement between them the protecting power has a large share in the executive authority of the protected state, the subjects of the latter may not be able to organise such a war without being insurgents in their own country

[1] *The Ionian Ships*, 2 Spinks 212.

Suzerain and Vassal States.

Superior and inferior or protecting and protected states are sometimes called suzerain and vassal, but this is a loose diction, and should be avoided. "Suzerain" and "vassal" are terms of mediaeval origin, and strictly imply two relations which the feudal system in its full development united. One was the personal relation of fidelity, binding the man to the defence of his lord and the lord to the protection of his man. The other was the proprietary and especially feudal relation by which the vassal's fief might be bound to make certain payments to the suzerain, or to render to him certain military or other services, and was subject to forfeiture on the vassal's breach of fidelity or failure to perform the attached obligations, and to escheat on failure of his heirs of the particular description pointed out by the tenure, but in the meantime was his property. The position either of suzerain or of vassal might be filled by a community as well as by an individual, and the little republic of Andorra in a valley of the Pyrenees exists to this day under the joint suzerainty of the bishop of Urgel in Spain and France as successor to the Counts of Foix. But the great example of feudalism and suzerainty was furnished by the Holy Roman Empire, which ended in 1806 by the abdication of the last emperor. Long before that time, in an age when property and the right to govern were ill distinguished, the legal doctrine that neither dues, services, nor the liability to escheat and forfeiture impaired the vassal's right of property while it lasted, had caused the presumption to be in his favour on all doubtful points of government. The argument was enforced against the ill endowed though suzerain emperors by the power and ambition of the greater states of Germany, and for centuries before the end of the empire came the imperial vassals had acted and been recognised as international sovereigns, making war and peace with full independence[1].

The term "suzerainty," little used in Western or Central Europe since 1806, has since been revived in connection with the gradual emancipation of the provinces of the Turkish Empire

[1] Grotius 1, 3, 23; of which section the summary is *summam potestatem habere posse qui feudi lege teneatur.*

chiefly inhabited by Christians. The Ottoman sultans created a privileged position for Moldavia and Wallachia by ordinances, called capitulations, of which the earliest dates from 1396; and when in 1856 those provinces and Servia were erected by the treaty of Paris into autonomous principalities, that is principalities enjoying separate internal government, the name of suzerainty was given to the position reserved to Turkey with regard to them[1]. Similarly, when in 1878 these principalities became independent states by the treaty of Berlin, Bulgaria was made an autonomous principality under the suzerainty of the sultan, as she still is. Each of these treaties defines certain points in the relations between the principalities in question on the one hand and the suzerain power and foreign states on the other hand, but neither defines the suzerainty, and the correlative description given to Bulgaria at Berlin was not vassal but tributary. In practice, the tendency has been to allow to Bulgaria the powers left open by the treaty of Berlin, and so it may be said that, as in the later days of the Holy Roman Empire, the presumption in doubtful points has been against the suzerain. Nor has the sultan done anything to merit, or even to claim, the better position which a suzerain of the early middle ages may have held, for when Bulgaria was unjustly attacked by Servia in 1886 he did not move in her defence, as in that character it would have been his duty to do. Actually, Bulgaria has direct relations with foreign states and concludes treaties with them, at least on certain subjects, though no doubt, so long as the present arrangements are sustained by the great powers, the consent of the sultan would be required to important treaties concerning her. She must therefore be described as a semi-sovereign state, but Turkey, the state which retains so much of the sovereignty as does not belong to Bulgaria, could not without absurdity be described as holding a protectorate over her. Bulgaria is rather under the simple, but not formally promised, protection of the great powers.

The mention of the privileged portions of the Turkish empire makes this an appropriate place for speaking of Egypt,

[1] Expressly in the case of Moldavia and Wallachia, while Servia was to "hold of the Sublime Porte," a term of vassality, and therefore implying suzerainty as its correlative.

a privileged province in which the family of Mehemet Ali governs under a series of firmans granted by the sultans, at present with the title of khedive or viceroy, and with large powers of internal government, as well as some right of diplomatic intercourse with foreign states. The practical authority is however in the hands of Great Britain under an occupation which began in 1882, and the case is too anomalous to admit of classification.

Nor can a section on suzerainty be closed without adverting to the late South African Republic, which has become by conquest the Transvaal Colony of Great Britain. The convention of Pretoria in 1881 established that territory as a republic under the suzerainty of the Queen of the United Kingdom, without defining that term, but with articles expressing the respective rights of the parties. By the convention of London in 1884 those articles were changed and the word "suzerainty" was not repeated. It became the subject of discussion whether that word was intended still to apply, but, even allowing that it did so, the precedents which we have had to notice would make it difficult to extract from its undefined use any further rights of the British Crown than were expressed in the articles. The point however was not really material, for the articles contained such a restriction of the power of the republic to conclude treaties with foreign states as clearly placed it in the position of an inferior and Great Britain in that of the superior state, and the relation between the two might not inappropriately have been described as a protectorate.

Neutralised States.

There are in Europe three states—the republic of Switzerland, the kingdom of Belgium, and the grand duchy of Luxemburg—which are bound to permanent neutrality by treaties with the great powers, these in their turn guaranteeing that neutrality. This peculiar situation—in which Switzerland was placed in 1815, Belgium from the erection of that kingdom after the revolution of 1830, and Luxemburg in 1867 in consequence of the dissolution of the Germanic Confederation of which it had been a member—must be mentioned here in order to guard

against the error which has sometimes been committed of supposing that it impairs the sovereignty of the states in question. It must be observed that the situation is practically the same in the three cases. In none is the independence of the state expressly guaranteed, and in that of Switzerland the guarantee is expressed as being, not of its neutrality, although that is recognised, but of the integrity and inviolability of its territory. Still, the territory of a state cannot be violated without infringing its neutrality, and it may be added that a similar infringement would result from an attack by force on its independence.

The effect of a guarantee is not to shift the primary burden of the guaranteed debt to the shoulders of the guarantor, and so one of these neutralised states, if unjustly attacked, will be expected to defend itself to the best of its ability while calling on the guarantors for aid. Nor can it be said that a neutralised state has renounced the right of seeking redress by war for wrongs committed against it, though it would certainly be bound first to request the guarantors to assist it in obtaining redress by diplomatic means. But by the position which it has accepted it has relinquished the right to intervene for the redress of wrongs suffered by others, and it must abstain from all political alliances and combinations, since, although these may have the general good for their object, it is seldom that their object is attainable without the employment or the menace of force. Even a customs union between Belgium and either Germany or France, or a treaty stipulating such differential duties as might lead to the suppression of the line of customs on the Belgian frontier, has been objected to by the guaranteeing powers as tending to a political alliance or combination[1]. These restrictions however leave the larger part of the field of external activity open. The neutralised state may conclude commercial treaties, enter into postal, monetary and other non-political unions, join in conventions or declarations for the amendment of international law, and so forth; while even the warlike action of which its neutralisation is intended to preclude the occasion may, as we have seen, be called for in defence of its territory or its rights. Neutralisation therefore does not carry with it the renunciation of any faculty of state life. It is merely an undertaking not

[1] Van de Weyer, in *Patria Belgica*, part 2, pp. 341, 2.

to do certain things, and no more impairs sovereignty than does an undertaking not to intervene in a particular war, or not to levy more than particular rates of duty on importations from a given country.

Besides, we have seen that it is necessary that for every part of the civilised world the full powers of sovereignty should exist. If therefore a neutralised state were semi-sovereign, it would be necessary to point out in what superior state, or in what federal system of states, the powers of sovereignty wanting to it were to be found. But the neutralised states form part of no federal system and are not tied to any other states as their superiors. Therefore they are not semi-sovereign but fully sovereign.

The subject of neutralised states having been introduced, it may be well to despatch at once certain considerations respecting it which might equally have been noticed under the head of treaties. Treaties of neutralisation are concluded with reference, express or tacit, to the territory belonging at the time to the neutralised state. The guarantors do not undertake the defence of any extension which that territory may receive without their consent. And if the neutralised state extends its territory without the consent of the guarantors, it raises the dangerous question whether the guarantee continues to exist even for its original territory, to the defence of which the dispersion of its forces over a larger area may render it incapable of contributing in the degree expected when the guarantee was given, at the same time that its extended limits may involve it in other causes of quarrel than could then have been foreseen.

On the other hand, treaties of neutralisation are exempt from the causes which in the lapse of time weaken the effect of many treaties. They are concluded in a reciprocal interest, being for the neutralised state a very important condition of its existence, and for the guarantors a security against the territory of that state being made the scene of hostile military operations. They are therefore not subject to unilateral denunciation by either party, and the considerations which led to them are not of such a nature as to become obsolete. Even if at the time of their conclusion they were intended to provide against a danger apprehended from a particular power, still they cannot be ranked with those invidious precautions which a great state usually

demands to be relieved from after a certain time, such as a stipulation that it shall not fortify some point in its own territory, since they equally take effect against other powers from which danger may afterwards arise. Such treaties are therefore to be regarded as a part of the permanent system of Europe, only liable to be affected by one of those great revolutions which disturb that system at long intervals. And it is probably this character of permanence which has led to their being sometimes erroneously regarded as restrictions of the sovereignty of the neutralised states.

What has been said in this section does not apply to the neutrality of the Congo State, which was not imposed on it, and has not been guaranteed by any power. By Art. 10 of the Final Act of the African Conference at Berlin the signatory parties only bind themselves to respect the neutrality of "the countries placed under the free trade system, so long as the powers" which enjoy any sovereignty or protectorate in those countries, "using their option of proclaiming themselves neutral, shall fulfil the duties which neutrality requires." In the conventional free trade zone so referred to there are comprised not only the Congo State, but possessions of England, Germany, Portugal and France. And since it was foreseen that those states, being at war, might hesitate to avail themselves of the proffered neutrality for their possessions in the free trade zone, the signatories by Art. 11 "bind themselves to lend their good offices" for the establishment of the neutrality. On its side the Congo State, by its circular of 1st August 1885, "declares that it shall be perpetually neutral, and that it claims the advantages guaranteed by Chapter 3 of" the Berlin Act, "at the same time assuming the duties which neutrality carries with it." Thus that state stands on the same footing as any other power, only with a unilateral declaration of perpetual neutrality for its territory, which the other powers have engaged themselves to respect so long as the Congo State maintains it in fact[1].

[1] See Lord Kimberley's despatch of 14 August 1894 to Lord Dufferin, British Ambassador at Paris, in which he questions "whether the claims of priority and preference which the French government base upon" the agreement of 1884 between France and the International Association of the Congo, afterwards developed into the Congo State, "are altogether com-

Personal, Real and Incorporate Unions of States: Federations and Federal States.

We have now to consider certain phases through which states of international law may pass, usually in the course of an advance towards amalgamation with one another. That goal is reached when two states have ceased not only to have distinct relations with the outside world but even to be supreme over their respective subjects, as England and Scotland were united under the name of Great Britain, and afterwards that whole was united with Ireland in the new whole called the United Kingdom, each of those wholes being a state under a single supreme government at home as well as having a single set of foreign relations. This is called an incorporate union, and has to be mentioned here only for the purpose of observing that the component parts are thereby taken out of international law.

In the case of monarchies an observation of converse form, but for our purpose of similar tendency, has to be made about what is often the first stage in the advance towards amalgamation. Suppose two monarchical states with which by their respective constitutions their sovereigns are so identified that international engagements made by or with those states are expressed as being made by or with the sovereigns, as for the United Kingdom it is the King that is the party to treaties. Suppose also that one head wears both crowns, as happened in Great Britain and Hanover from 1714 to 1837, but that, as also happened in that instance, the foreign relations of the two states are kept distinct, the common sovereign habitually taking international action for them separately, so that it is even possible for

patible with the position of the Congo State as a neutral, and whether the declaration of neutrality addressed to and accepted by the signatories of the Act of Berlin does not entitle those signatories to make their own reservation in regard to rights of reversion or preemption claimed by a non-neutral power in virtue of a previous agreement which has not received their sanction, of which indeed they have no official cognisance, and which was made not with the Congo State or its sovereign, but with the International Association that preceded it." Egypt, no. 2 (1898); c. 9054; p. 17.

the one state to be at war while the other is at peace. And further suppose that the rules of succession in the two states, of which third powers are cognisant because they have had to take notice of them in recognising the descent of the crowns on the same head, may threaten to separate them again, as was always threatened by the exclusion of females in Hanover and not in Great Britain. In the case thus supposed there is said to be a personal union between the two states though in truth there is no union between them, and it must be observed that, as in the case of an incorporate union, no doctrine of international law is concerned, the separate existence of the states in the one case not having begun to be overshadowed, and in the other case having entirely ceased. One actual example of personal union is furnished by the kingdom of Belgium and the Congo State, of which the king of the Belgians is the sovereign. A republic, of which the international engagements are made in its name and not in that of its chief magistrate, is incapable of such a seeming union with any other state, as it cannot avoid remaining distinct on the face of every transaction. In the case of a personal union of monarchies the subjects of the two crowns are distinct in theory and may be distinct in fact. It is true that during the time that the sovereign of Hanover, at first elector and afterwards king, was king of England, it was held that the personal character of allegiance prevented Hanoverians from being aliens in England and Englishmen from being aliens in Hanover, though on the separation of the crowns the Hanoverians at once became aliens in England[1]. But this only affected the conditions for acquiring in each respective country the internationally distinct character of its subject.

From the mere semblance of union just discussed a step in advance may be taken in either or both of two ways. The rules of succession in the two monarchies may be assimilated to one another, so as to exclude the chance of the crowns being separated by their operation. This was done for Austria and Hungary by the Pragmatic Sanction of 1723, which provided for the succession of Maria Theresa in both countries in accordance with the Hungarian rule, while enacting the Austrian exclusion of females as the rule in both countries

[1] *Isaacson v. Durant,* 17 Q. B. D. 54.

thereafter. The situation so created was described by Sir Travers Twiss as a permanent personal union, but has been more generally called a real union. Or the common sovereign, instead of habitually taking international action for his countries separately, may habitually unite them in his international action, so that the one being at war while the other is at peace becomes a contingency which, though theoretically possible, is not dreamed of in practical politics so long as the crowns continue to rest on the same head. It was in this way that the Hapsburg sovereigns acted for Austria and Hungary even before the date of the Pragmatic Sanction; and such a condition of things, if the classifications of international law are to be based on facts, would seem to have as good a claim to be regarded as a distinct stage in the process of unification as that which is constituted by securing the permanence of personal union. But I am not aware that any writer has described the union of Austria and Hungary before the Pragmatic Sanction otherwise than as personal.

A further step is made in advance when by the terms of their union two countries, and this time either monarchies or republics, are amalgamated for foreign affairs, so that they form constitutionally as well as *de facto* a single state of international law, by and with which all international engagements are made, although internally each remains a state supreme over its own subjects. This is a real union, properly so called, and in its international effects it is not different from an incorporate union, at least so long as no attempt is made to disturb it. It has been since 1867 the case of the empire of Austria and the kingdom of Hungary, which, though remaining for most purposes distinct, have common ministries of foreign affairs, war, and finance, and of which the international engagements are made by and with the emperor-king, so that to foreign countries they are only known as the one state of Austria-Hungary. Another case falling within the description of real union here given is that of Sweden and Norway, which have indeed fewer points of contact with one another than Austria and Hungary now have, but of both which by the terms of their union the same person must always be king, and he conducts their foreign affairs.

Before going further it will be well to point out that in speaking of *engagements* made *by and with* a single state we have, advisedly, not mentioned *arrangements* made *for* a single state. It would not in our opinion impair the real union of Austria and Hungary if those countries should cease to be joined as they now are in a customs union, and the emperor-king should conclude different commercial treaties for them. Nor do we regard it as sufficient to prevent the union of Sweden and Norway from being properly described as real that Norway has had a different commercial flag from that of Sweden from the beginning, and a different military flag since 1844. The British colonies have not become states of international law because reciprocity treaties with the United States are sometimes concluded by the sovereign of the United Kingdom for American possessions, or because Australia has been granted a separate flag. Nor was Prussia the less an international unit because in 1815 she became a member of the Germanic Confederation for a part only of her dominions.

Such unions as we consider to be properly described by the name of real are the last stage possible, but by no means a necessary one, before the states concerned in them, sinking their separate internal existence, form an incorporate union; and it may be interesting to trace the stages through which England and Scotland passed to that consummation. When in 1603, on the death of Elizabeth, who was at war with Spain, the crown of England descended on James the Sixth of Scotland, who in that character was at peace with Spain, an instructive instance of the simplest personal union was presented. James received the Count d'Aremberg, sent by the archdukes Ferdinand and Isabella, the Spanish regents of the Netherlands, as the envoy of a friendly power, but peace between England and Spain was only concluded in 1604. The foreign relations of the two states having been assimilated by that peace, and being thenceforward practically carried on as those of a single state, and the rules of succession to the two crowns being also similar, the international position of the countries became that which belonged to the Hapsburg dominions between the Pragmatic Sanction and the troubles which ended in the arrangement of 1867. But when the Scotch parliament declined to settle the

crown on the house of Hanover in succession to Anne, as the English parliament had done, the permanence of the union of the crowns was threatened, and yet the two countries continued to be presented to the world in negotiation as one, which was just the position of the Hapsburg dominions before the Pragmatic Sanction. And then, by the statute of Anne, the incorporate union of England and Scotland was effected without their having passed through any stage corresponding to the present conditions of Austria-Hungary or Sweden and Norway.

It is sometimes difficult to determine whether the union between two or more states is incorporate or only real, that is, whether they continue to exist as separate states for domestic purposes. The United States of America present an example of incorporate union disputed in their civil war, but probably not again to be questioned. The right nomenclature to be applied to the case of Sweden and Norway is the subject of a wide range of opinion, Wheaton and Phillimore calling their union personal, while Klüber, Heffter, Bluntschli, Holtzendorff and Rivier call it real. Twiss regards it as federal; and Hall, who says that real and federal unions are not distinguishable for international purposes, compares the power of the Swedo-Norwegian king with that of the federal government of the United States[1]. It is indeed true that between real and federal unions the difference is not in the closeness of the international connection existing between the states united but in the origin of that connection, the term "federal" being used to denote that a treaty is the origin of a connection identical in its international aspect with that which would be unhesitatingly called real if it arose from succession to a throne or from internal constitutional change. But a treaty tie between states admits of modifications of form, especially of some surrender of their internal distinctness, some approximation towards an incorporate union, which could not arise from the mere descent of different crowns on one head, even when the permanence of the union of the crowns is secured. And in the international aspect a treaty tie between states may be so close as to set up a federal state, in German *bundesstaat*, in which case it is pretty

[1] § 4, pp. 27, 28..

certain that there will be some surrender of their internal distinctness, or it may be limited to forming a federation of states, in German *staatenbund*. The former term is appropriate when the union, though not incorporate—for if it were so the federal stage would have been left behind—is real, only a single state being presented to foreign recognition and relations. The latter term is appropriate when the states which compose the federation are not interdicted from all foreign relations, although those allowed to them may be so insignificant that a more correct idea of the working of the arrangement would be given by calling the whole a federal state. Such are the cases of Switzerland under its present constitution and of the present German empire; but the German Confederation which existed from 1815 to 1866 was of a loose kind, the international importance of Austria, Prussia and the other states comprised in it vastly outweighing that of the federal body. In the United States of America the thirteen original states first drew together in a way which was truly federal, but their present union is incorporate and only called federal by way of reminiscence, just as the component states are called states only by way of reminiscence: it is not even federal in the sense of having been brought about by treaty, for it was brought about by the concurrent action of the states in adopting the constitution of 1787.

In all the cases which we have been considering the practical international question is whether, on an attempt being made to break up an existing union against the will of the government which represents it to foreign states, the part making the attempt can claim immediate recognition as a state always known to the outside world and only resuming an interrupted career of separate international action, or whether it must first make good its claim by attaining the measure of success which would be a necessary condition for the recognition of a new state erected by insurgents. There can be little doubt but that the latter will be the true answer, whether the union which it is attempted to break up be correctly described as personal, real, incorporate, or federal. The certainty of international relations, which is so important to peace, appears to demand that account shall be taken only of those relations which had an active existence when the difficulty arose, and

not of others which were in abeyance or obsolete. And the view here taken may be considered to have received international approbation by the fact that no power recognised the attempted separation of Hungary from Austria in 1849, or that of the confederated states from the United States of America in 1861. This being so, the space which some writers devote to the distinctions between the different kinds of union between states, disproportioned as it is to their international importance, is probably due to the belief in a science of public law of which international law is supposed to be a branch. In England we are more disposed to think that public law is a matter depending in each country on its national constitution, and that international law stands by itself. Nor with our meaning of "law" could we well think otherwise, for state societies and the international society are the only ones which adopt and enforce rules, and any points of agreement which might be picked out from a number of state constitutions, however scientifically arranged and discussed, could not be a system of law in any proper sense. But a knowledge of the terms on which the different unions of states exist is very important for politicians and diplomatists: those terms, and the sentiments which the populations concerned entertain with regard to them, are among the leading facts of the world in which statecraft has to move and act.

The Position of the Pope.

In discussing the classification of European states it is necessary to mention the position of the pope, because it is often misunderstood. Until 1870 he was the sovereign of a state. In that year the kingdom of Italy annexed Rome and the surrounding territory which still remained to him, but by a law of the kingdom, called the Law of Guarantees and passed on 13 May 1871, it gave him the necessary safeguards for the free exercise of his spiritual power. Those safeguards, in a summary description of them, had been promised in a circular despatch addressed on 18 October 1870 by the Minister of Foreign Affairs, the Marquis Visconti Venosta, to the Italian representatives at the different courts. But no steps were

taken by the powers with a view to get that promise embodied in an international engagement, and the general acquiescence with which the situation regulated by the Law of Guarantees has met must be taken as an acknowledgment that the promise was duly fulfilled by it. The pope therefore has now no international position; none as a sovereign—for by the loss of his territory he has ceased to be one—and none as the subject-matter of an international contract, for there is no such contract relating to him. His spiritual importance as the head of the Roman Church has not been diminished, perhaps has been increased, by the change; and those who see him still occupying a great position sometimes fall into the error of supposing that it still combines in some way the two grounds, temporal and spiritual, on which it formerly rested. It may be admitted that the Law of Guarantees possesses an interest for the world beyond that of an ordinary national statute, that it expresses the *modus vivendi* which Italy not only offers to a far-reaching moral force but carries out on her part, notwithstanding that the popes have not accepted it, and that foreign powers may conceivably show as much concern for its maintenance or its alteration as they have shown on different occasions about the terms of union between the states of Germany or the cantons of Switzerland. And those who reckon personal and real unions and federal constitutions as belonging to a science of public law may treat the position of the pope as a part of the public law of Europe; but it does not belong to international law.

The principal provisions of the Law of Guarantees are as follows. The pope's person is inviolable. He enjoys in Italy the honours belonging to sovereigns and the precedence which is allowed him by Catholic sovereigns, so that he would take precedence of the king if they happened to meet. For his person and palaces he may keep the number of guards previously usual, and no official of the state may enter either his palaces or his actual residence without his permission. Absolute personal immunities are enacted for the members of an œcumenical council, and for the cardinals during a vacancy of the papal throne. Protection is given to papal officers engaged in Rome in publishing the acts of the spiritual power, and to the books and papers of papal offices and congregations of an exclusively spiritual

character. Every foreigner invested in Rome with a spiritual office enjoys all the personal guarantees which the laws of the kingdom secure to its subjects. All Catholic institutions for the education of the clergy in Rome and the six suburbicarian dioceses depend exclusively on the holy see, and are exempt from interference by the educational authorities of the state. The pope's correspondence with the bishops and the Catholic world is free, and he may have his own post and telegraph offices at the Vatican and his other residences. The representatives accredited to him by foreign governments and those sent by him to them enjoy the privileges of diplomatic agents. He has the free use of the Vatican and Lateran palaces and of the villa of Castel Gandolfo, with their grounds and collections, but without power of alienation. And a sum of 3,225,000 lire, or £129,000, being the amount which was previously devoted in the Roman budget to the expenses which he now has to support, is annually placed by the kingdom to his credit, but the popes thus far have not availed themselves of it.

The position thus made for the pope comprises, along with much else, the exterritoriality enjoyed by a crowned head who visits a foreign country, but it is not a continuance of his sovereignty, nor, in spite of the assertion made by the Cardinal Secretary of State Jacobini in his circular of 11 September 1883, do the powers which receive his legates and nuncios and allow them their accustomed diplomatic rank thereby acknowledge him as a sovereign. That rank was never regarded as a consequence of the pope's temporal power but of his headship of the Catholic Church, to which the larger part of the business which his representatives had to transact always related, and it remains on the old footing, as does the ecclesiastical business. The pope is without either territory or subjects, for his palaces have not been excepted from the Italian conquest and he is allowed only limited rights in them, and his guards and officers are not his subjects. On the other hand he has not himself been declared an Italian subject, and the privileges which he enjoys are inconsistent with personal subjection. His position therefore is quite abnormal, but then, as Geffcken remarks, the papacy is a unique phenomenon in history[1].

[1] In 2 *Holtzendorff* 182. The piece here referred to is a valuable one.

States of European Civilisation and Others.

The international society which develops international law by its controlling opinion, enforces it by the irregular methods at its disposal, and receives or claims to receive its full application to all its members, is composed of all the states of European blood, that is of all the European and American states except Turkey, and of Japan. Outside Europe and America there are three Christian states to the dealings with which international law would be considered to apply, though they can hardly be ranked as contributing to its development or enforcement—Abyssinia, backward in civilisation, the little republic of Liberia, and the Congo State, which may be reckoned as Christian in respect of its sovereign being the king of the Belgians though its population is African and heathen.

Beyond the above limits the international society exercises the right of admitting states to parts of its law without admitting them to the whole of it. Such is the case with Morocco, Turkey, Muscat, Persia, Siam and China. The European and American states maintain diplomatic intercourse and conclude treaties with them, they regard their territories as being held by titles of the same kind as those by which they hold their own, and when at war with them they regard the laws of war as being reciprocally binding just as between themselves. But the civilisation of those countries differs from that of the Christian world in such important particulars, especially in the family relations and in the criminal law and its administration, that it is deemed necessary for Europeans and Americans among them to be protected by the enjoyment of a more or less separate system of law under their consuls. These consular systems are established by treaties concluded with the territorial powers, which possess civilisations of their own sufficiently complex to enable them to appreciate the necessity, and their maintenance as well as their establishment must depend to a considerable extent on the concurrence of those powers. For the few guards and officers of which the consuls dispose, and even the influence derived from the foreign forces which stand at their back, would

be unable to maintain the regular working of such systems if the territorial authority did not on all ordinary occasions uphold order and protect each class of inhabitants in the enjoyment of the legal system allowed it. Failing that, the position of foreigners would be so untenable that either their conquest of the country in question or the termination of their residence in it would soon follow. Japan has recently been raised from this class of states to the full community of international law, the consular jurisdiction there having been given up in pursuance of treaties which the European and American powers concluded with that empire, and which came into force in 1899.

States and their Dependencies: the British Colonies and the Native States of India.

The colonial and other dependencies of a state are not in personal union with it, although if the government is monarchical the same person is the sovereign of both, for the constitutional tie between them is indissoluble. Neither are they in real union with the parent or supreme state, because they do not stand side by side with it as equals, and this whether the authority exercised over them be as absolute as that of the United Kingdom over Gibraltar, or as attenuated as that of the United Kingdom over Australia. Nor again are they in incorporate union with the parent or supreme state, because they are not amalgamated with it for internal purposes, although for international purposes they form one whole with it. They form with it one dominion or set of dominions, represented abroad by the parent or supreme state.

In the case of the great British dependency, India, the relation is a little complicated by the fact that not the whole of it has been made a British dominion, many native states being allowed to exist in it under an undefined British supremacy. To speak accurately of such a case we want two words to express the two meanings of empire in English, one meaning, translatable in German by *reich*, being the total of the dominions of a given sovereign or state, the other, translatable in German

by *gebiet*, including the whole extent of territory in which he or it exercises power. In the former sense what is called British India is alone a part of the empire, in the latter the native states are included in it. The position of these is defined by two declarations carrying the highest authority. On the external side, the preamble of the Act of Parliament (1876) which applies to them the British Indian legislation against the slave trade, st. 39 and 40 Vict., c. 46, says:

"And whereas the several princes and states of India in alliance with Her Majesty have no connections, engagements or communications with foreign powers, and the subjects of such princes and states are, when residing or being in the places hereinafter referred to, entitled to the protection of the British government, and receive such protection equally with the subjects of Her Majesty."

On the internal side, that is the relation of the native states to the British power, the government of India published the following notification in its official Gazette, No. 1700 E, 21 August 1891:

"The principles of international law have no bearing upon the relations between the government of India as representing the queen-empress on the one hand, and the native states under the suzerainty of Her Majesty on the other. The paramount supremacy of the former presupposes and implies the subordination of the latter."

Thus India is a world of itself. Not only is the action of all foreign states excluded from every part of it, but those parts which are not included in the dominions of the king-emperor are subject to a suzerainty, paramouncy or supremacy possessed by him, to which nothing parallel exists in the relations of states of international law. The relations between any two or more of those states are to be found in the public documents which establish them, and we have seen that no doubtful points are decided in favour of a suzerain by the mere force of that name. In India on the other hand the paramount power and the correlative subordination are left without definition, and it is taught that the treaties and grants held by the protected princes, and the precedents of our dealings with them and with the protected princes who hold no treaties or grants, must be read as a whole, so that the principles most recently laid down are to

be applied to all, and those relating to any department of conduct, as military affairs or the duties of humanity, are to be ascertained for all from the document in which that department is most fully worked out for any one[1]. Hence the empire of India, as a term of state law, must be understood in the widest sense. It comprises the whole peninsula and is indissolubly connected with the United Kingdom, the British parliament of king, lords, and commons having the ultimate authority over it.

[1] Sir W. Lee-Warner, *The Protected Princes of India*, pp. 37—40.

CHAPTER IV.

THE ORIGIN, CONTINUITY, AND EXTINCTION OF STATES.

The State System as a Growing Body.

It has been said that "the marks of an independent state are that the community constituting it is permanently established for a political end, that it possesses a defined territory, and that it is independent of external control[1]." This is true, and it is important when there is a question of admitting a state as a new member of the international society, but there are old members of that society which do indeed possess those marks but do not owe their introduction to any test or qualification. They are or represent the founders of the civilised state system, and stand in it by virtue of a history reaching further back than the rules of that system.

The actual state system of the civilised world dates from the Peace of Westphalia, which closed the Thirty Years' War in 1648. The intercourse between most European states had previously been intermittent, but the multitude of representatives assembled at the congress which concluded that peace was in itself an affirmation of the existence of a body of states whose interests, whether agreeing or clashing, did not permit them to be strangers to one another, and ever since then it has been the practice for every state belonging to the system to be permanently represented at the capitals of the other

[1] Hall, § 1, p. 18.

states by resident ambassadors or ministers of inferior rank. The principle of accepting accomplished facts as the ground of international relations was exemplified in a striking manner by the recognition of the independence of the United Netherlands and Switzerland, and by the acknowledgment of the right of the princes and cities comprised within the Holy Roman Empire to contract diplomatic engagements with each other and with states outside the empire, subject only to the condition, which there were no means of enforcing, that their engagements should not be prejudicial to the empire or the emperor. The tendency to base international relations on general grounds of principle, so far as facts permit, was strongly promoted by the great number of the states which thus enjoyed unquestioned sovereignty, while many of them were so weak that there could be little safety for them if grounds of principle were abandoned. And it was established that the principles to be admitted were secular: the pope's claim to supreme temporal authority was obsolete, and now the Protestant states in Germany were firmly placed on an equal footing with the Catholic ones. The modern international society was thus founded, and the states which belonged to it in 1648, including those which continue their identity under different names and with varied limits, as Savoy became Sardinia and Sardinia Italy, may be called its original members. Since 1648, without reckoning the growing intercourse with states of various Oriental civilisations, new members have been added to the full international society by many different processes.

First must be mentioned the entrance of Russia into the great state system, an ancient Christian empire which in older times had been little in contact with Central and Western Europe. In those times she, together with Poland, Sweden, and Denmark, three original members of the great system, formed another system more or less similar to the great one. As a consequence of the reforms and the ambition of Peter the First she entered the great system through her own political action, and the two systems were fused.

Secondly, Japan illustrates another mode in which an ancient state may become a full member of the international society. She did not enter it, like Russia, by her own political action,

but through being freed by the European and American powers from the consular jurisdiction which was the badge of her imperfect membership.

Thirdly, a new member may be added to the international society by the erection of a state with European modes of government in a region previously uncivilised. Of this the most important example is that of the Congo State.

The international association of the Congo, founded by the king of the Belgians, acquired so solid a footing in a part of Central Africa that in 1884 and the beginning of 1885 it concluded treaties with the United States of America and numerous European powers, by which, among other things, the boundaries of its territory were agreed on with the powers having conterminous possessions. Its name and constitution were then changed to those of a state, with the king of the Belgians as its sovereign, and it was admitted to sign the General Act of the African Conference of Berlin. Another example is that of the republic of Liberia on the Guinea Coast, which has grown out of a settlement made in 1820 by the American Colonization Society with free negroes from the United States, and since 1847 has been recognised by the United States and the European powers as an independent state. Here we see European institutions, learnt on civilised soil by men of other blood and transported by them to another region of the earth, accepted as the equivalent of European blood.

Fourthly, a new member of the international society may arise by the voluntary subdivision of an old member, as when the king of Portugal, of which state Brazil was a possession, separated Brazil from the mother country and made himself its emperor, abdicating the throne of Portugal. Brazil has since become a republic.

Fifthly, the new member may be a new state erected by one of those arrangements which the great powers make in their ill defined character of the representatives of Europe. The occasion for such creations is the struggle of a people for independence, and usually only one or two of the powers come in the first instance to the aid of the struggling people, but ultimately they all agree in sanctioning the result as a matter of European arrangement. Thus Belgium was carved out of

the Netherlands, England and France being the first to take up the cause of the Belgian insurgents in 1830, but the other powers assisting in the conferences and negotiations which followed until the new order was accepted by all of them, and finally by the Netherlands in 1839. Thus also Rumania and Servia have been carved out of Turkey, Russia having been the prime mover in their emancipation, but the successive stages of the result being consecrated by the congresses of Paris in 1856 and Berlin in 1878. In cases of this class the powers which are concerned in the formal erection of the new state are able to impose conditions on it, as that of permanent neutrality was imposed on Belgium, and on Rumania and Servia that of religious toleration, which Rumania has practically set at nought. Religious toleration was also imposed at Berlin on Montenegro, a state which had been previously recognised as independent by all the great powers except England and Turkey, but which, by the more secure position and the extension of territory given to it by the congress, partook of the nature of states erected by European arrangement.

Sixthly, the new member may have separated itself from some state of the international society, and its independence may have been recognised by the state from which it separated and by others, one by one as they found it desirable to aid in its insurrection or to enter into diplomatic intercourse with it, without there being anything in the nature of a collective recognition or general arrangement. This was the case of the United States of America and of the Spanish American republics, and that of Greece may best be classed under this head.

Seventhly, the admission of Turkey to the European state system requires particular mention. As we have seen, it has not even yet been a complete admission to the international society, but, such as it is, it was made formally by the treaty of Paris in 1856. By the seventh article of that treaty the sovereigns of England, Austria, France, Prussia, Russia and Sardinia "declare the Sublime Porte admitted to participate in the advantages of the public law and system of Europe. Their Majesties engage, each on his part, to respect the independence and the territorial integrity of the Ottoman empire, guarantee in common the strict observance of that engagement, and will in consequence

consider any act tending to its violation as a question of general interest." The advantages of the public law and system of Europe are not in this to be taken as all those of international law; that interpretation would be conclusively negatived by the fact that the consular jurisdiction in Turkey was maintained. The word "system," which in the English official version replaces and indeed accurately translates the word *concert* of the French text, is a well known term of diplomacy for a group of states bound together by some tie of common policy; and what common policy was here intended appears from the engagement to consider any act tending to violate the independence or territorial integrity of the Ottoman empire as a question of general interest. Russia and Austria had, from the seventeenth century, been left to settle their differences with Turkey and to encroach on her with only occasional interference by any of the other Christian powers. The principle which since the Peace of Westphalia had governed the international politics of central and western Europe, and after the admission of Russia the relations of the other Christian powers with her also, namely that any alteration of the map is a matter of legitimate interest even to the remotest member of the state system, had not been extended to Turkey, but was now to be so. The effect of that extension was seen when the powers regarded themselves as entitled to require the treaty concluded by Russia with Turkey at San Stefano to be submitted for revision to the congress of Berlin. As to the independence and territorial integrity of the Ottoman empire, they would stand after the settlement at Paris on the same level as the respect which the Christian powers profess to feel for the independence and territorial integrity of one another, except so far as the clause by which the Christian sovereigns guaranteed in common the strict observance of that respect would have placed it on a higher level. But that clause must be considered as obsolete since the events of 1877 and 1878, which amounted to one of those revolutionary changes of circumstance by which guarantees, concluded as they always are with reference to a certain state of things, are swept away[1].

[1] This is also the opinion of Professor Holland: *The European Concert in the Eastern Question,* p. 245.

The form of recognising a new member of the international society is usually the *de facto* one of entering into diplomatic intercourse with it, by mutually accrediting and receiving diplomatic agents, or by signing with it a treaty, like that by which France came to the assistance of the United States in 1778, or a public Act, like the General Act of the African Conference of Berlin, by signing which together with the Congo State that state was recognised even by those of the signatories which had not previously concluded treaties with it. In the case of Rumania and Servia, where states were created by congresses at which they were not present and the treaties resulting from which they were not called on to sign, what was done at the congresses merely amounted to putting on record the will of Europe as represented by the great powers, and obtaining the consent of Turkey to her dismemberment. The actual recognition of the new states had to follow by accrediting diplomatic agents to them, and the different powers delayed to accredit any to Rumania till they received such proof as they respectively deemed sufficient of her willingness to fulfil the condition of religious toleration.

In no case does the new state make to the recognising states an express declaration of its intention to be bound by the rules or principles of international law. Those therefore who lay it down that it is only by virtue of its consent to international law that a state is bound by it, are obliged to infer that consent from incidents in which we may be sure that nothing of the kind was thought of when they occurred. Practically the obligation is always assumed to exist, and it is therefore more reasonable to enquire what is its source than to strain inferences in order to prove that it has been admitted. The source is in our judgment not far to seek. The new state cannot, if it would, stand isolated, and since it shares the benefits of living in a society with other states it must accept the laws of that society. The action of a state is the action of the men who compose or govern it, and there is not in natural justice a right for men to sink their individual responsibilities by forming associations at their free pleasure. The right of association can only exist when fenced by such regulations as the society in which it is enjoyed finds to be necessary for its protection, and

international law is the body of regulations by which the society of states fences the right of men, living in inevitably close contact with one another, to associate themselves in states.

The only other point to be mentioned in connection with the admission of new states in general is that the recognising powers must respectively be satisfied that the new state gives sufficient promise of stability in its government. No power would willingly try to weave ties with a rope of sand.

The Recognition of the Belligerency of Insurgents.

We have now to consider more particularly the mode of origin of a new state which has been noticed above in the sixth place, separation by insurrection from some state of the international society. In that case a stage is often interposed before the recognition of the insurgent body as a new state, namely its recognition as a belligerent, that is the recognition that between the insurgent body and the old government a war is proceeding during which the interests of foreign states and their subjects affected by it must be dealt with on the same footing as those of neutrals in a war between recognised states. In the beginning of any insurrection the subjects of foreign states may suffer loss or inconvenience, and it may be necessary for those states to make representations on their behalf to the recognised government of the country in which the struggle takes place, but they must do so as to a government with which they are in amity, and with due consideration for the practical difficulties with which it may have to contend. If the insurrection acquires consistency, then, since the subjects of foreign states and their property requiring protection may be found within the lines of the insurgents as well as within those of the government forces, it may be necessary for those states to have some kind of communication with the authorities among the insurgents. Thus the foreign consuls in the Confederate States, nominated before the outbreak of the American civil war, continued to exercise their functions during its progress; and England nominated consuls to the various South American

republics eighteen months before the earliest recognition of any of them as a state[1]. Such proceedings are measures of business, quite distinct from political recognition, and if the insurgent authorities impede the exercise of consular functions in the hope of hastening political recognition they have only to blame themselves for any inconvenience which they or their cause may suffer in consequence. Beyond this the duty which normally lies on foreign states not to intervene in the internal dissensions of a friendly state makes it their normal duty not to go without necessity, and that principle applies equally to recognition of belligerency and recognition as a state, though the necessity may arise earlier for the one than for the other.

Taking first a recognition of belligerency, we must observe that although we have been led to speak of it by the case of an insurrection aiming at separation, what has to be said on it applies equally to the case of an insurrection aiming at a change of government in a state from which it is not desired to separate. The normal justification of a recognition of belligerency requires that there shall be a real war, that is a contest carried on with the dimensions and by the methods of war and not by the methods of savagery, and further that the recognising state shall have been brought into contact with that war, that is that it shall be under the necessity of taking some line of action involving either its recognition or its non-recognition. Otherwise the recognition would be gratuitous, therefore offensive to the old government, and sure to be represented by it as aiding the insurgents by its moral effect.

The Hungarian rising of 1849 was a real war, but carried on by land only, so that only countries with conterminous frontiers could naturally be in contact with it. Russia intervened in favour of Austria, and a counter-intervention by other powers might thereby have been justified, but England or France would not have been justified on general grounds in declaring Hungary to be a belligerent, and they did not do so. Where there is a conterminous frontier a foreign state will seldom fail to be under the necessity of taking some line involving either the recognition or the non-recognition of belligerency. The recog-

[1] Hall, §105, p. 336.

nition would mean that neither party should be allowed to make the foreign territory a base of operations, and that the forces of either party crossing the frontier should be disarmed and interned. The non-recognition would mean that the old government, as a friend harassed by disorder, might make the territory a base of operations but the insurgents not, and that insurgents crossing the frontier should be disarmed and interned but not necessarily government forces. Thus Austria and Prussia are driven to choose in case of an insurrection in Russian Poland, and France is driven to choose in case of an insurrection in Spain. When the war is carried on by sea all maritime powers are continually placed under a similar necessity of choosing, by the very action which they take, whether or not they will recognise the insurgents as belligerents. If the insurgents bring prizes into their ports, recognition will mean that the lawfulness of the captures must not be disputed, but that the captors must submit to the regulations made by the foreign state in question as to such use of its ports, while non-recognition will mean that the prizes may be taken from the captors and restored as the proceeds of robbery. And neutral ships and goods may be affected by either of the contending parties in the various ways in which they are liable to be affected under the laws of war. If again the old government tries to elude the laws of war by closing to commerce, as an act of domestic sovereignty, ports not in its power but occupied by insurgents, the submission of foreign states to such closure will be a refusal to recognise the belligerency, and their refusal to submit to it will be a recognition of the belligerency. "In 1861, New Granada being in a state of civil war, its government announced that certain ports would be closed, not by blockade but by order.....Lord John Russell [British Foreign Secretary], speaking upon the subject, said 'that it was perfectly competent to the government of a country in a state of tranquillity to say which ports should be open to trade and which should be closed. But in the event of insurrection or civil war in that country, it was not competent for its government to close ports which were *de facto* in the hands of the insurgents, and that such a proceeding would be an evasion of the international law relating to blockade[1].'" In

[1] Hall, § 5, p. 37, quoting Hansard, clxiii, 1646.

1885 Mr Bayard, Secretary of State of the United States, similarly refused to acknowledge the closure of certain ports in the possession of insurgents, which had been declared by Colombia, that is New Granada under a changed name[1].

If when one course or the other must be taken, whether in an exclusively land war or in one waged also at sea, the choice made is in favour of recognising belligerency, and the recognising power gives the insurgents no more aid than that which they indirectly derive from such recognition, it cannot be accused of intervention in any sense in which that term carries condemnation, and the old government is not entitled to take offence. That government, besides its chance of sharing in the indirect benefit, will at least be relieved from all doubt as to its responsibility for the acts of the insurgents. If the choice had been made against the recognition of belligerency, the old government would probably on the whole have derived the greatest indirect benefit but would not have said that there was an intervention, though that name would have been better deserved than in the opposite case, because the foreign state would have shut its eyes to the fact of there being a real war and have treated combatants as rioters or pirates. The truth is that in the circumstances supposed the normal duty of non-intervention in the internal dissensions of foreign countries dictates neither the one choice nor the other, because each has the practical effect of intervention even though not intended as such, and the foreign state is free, so far as that duty is concerned, to consult its own interest and the general political good of the world.

In some cases the government against which the insurrection is directed relieves other powers from the necessity of choice by dealing on the footing of war with some part of the situation which affects those powers. This happened when in 1861 the coast of the Confederate States was declared by the United States to be closed to commerce, not only by a domestic order as in the cases of New Granada or Colombia quoted above, but by a regular blockade. "I, Abraham Lincoln, president of the United States," said the proclamation of 19 April 1861, "have deemed it advisable to set on foot a blockade of the ports

[1] Hall, *loc. cit.*

within the states aforesaid in pursuance of the laws of the United States and of the law of nations in such case provided." After this the maritime powers of the world had no alternative but to submit to a war measure taken in the prosecution of a war otherwise notorious, and they did so, but the inevitable consequence was that the Confederate States, whose belligerency was thus recognised by their opponents, became entitled to the whole range of the powers enjoyed by a belligerent in maritime war. The British proclamation of neutrality was dated on 13 May, and would perhaps have been justified even without President Lincoln's proclamation by one which the president of the Confederate States had issued on 17 April inviting applications for letters of marque and reprisal, under which an immediate commencement of maritime war might be expected.

We have said that, so far as the duty of non-intervention is concerned, a foreign state is free to consult its own interest and the general political good of the world in deciding whether to recognise as war an insurrection which is really war and touches it. It remains to be considered whether in such a case a foreign state is not bound by a duty of another kind to recognise the belligerency of the insurgents. Vattel and Bluntschli hold that civil contests in which each party acts as a state must be treated as wars between independent states, and although their arguments are drawn from the ferocity which would be introduced into such contests if prisoners were executed as rebels, their language leaves no doubt that they did not intend to restrict their doctrine to the treatment which the opposing parties must extend to each other. Evidently they looked on the position of insurgents carrying on a real war as a question of public law, the answer to which must be one and the same for the international branch of public law, and therefore for foreign states, as for the domestic branch directly affecting the parties[1]. Rivier, on the contrary, holds foreign states to be quite free in their choice as to recognition of belligerency: *ils peuvent reconnaître aux insurgés le caractère de belligérants. S'ils le font, et seulement pour ceux qui le font,*

[1] Vattel, l. 3, c. 18, §§ 293-5; Bluntschli, § 512. See what has been said above about the continental view of public law, p. 37.

la guerre civile est assimilée à la guerre entre Etats[1]. Hall admits that it would be "inhuman for foreign states to capture and hang the crews of warships as pirates; humanity requires that the members of such a community [as we are considering] shall be treated as belligerents, and if so there must be a point at which they have a right to demand what confessedly must be granted....But the obligation...flows directly from the moral duty of human conduct, and in the case of foreign states from that also of not inflicting a penalty where there is no right to judge; it has nothing to do with international law. As a belligerent community is not in itself a legal person [does not this beg the question? J. W.], a society claiming only to be belligerent and not to have permanently established its independence can have no rights under that law[2]." Elsewhere Hall says that "theoretically a politically organised community enters as of right into the family of states, and must be treated according to law, as soon as it is able to show that it possesses the marks of a state[3]." His view therefore is that recognition of belligerency cannot be claimed as of right until recognition of independence can be so claimed, when the lesser claim will of course be included in the greater. As regards practice, in 1779 the Dano-Norwegian government delivered up to England some merchant vessels of which the United States squadron under Paul Jones had made prizes, and which had been sent into Norwegian ports. Compensation was demanded by the States, which argued that during a civil war a foreign state which does not take one side or the other "must allow to both the contending parties all the rights which public war gives to independent sovereigns." And "the claim against Denmark was kept alive by intermittent action until 1844, and does not appear to have been ever formally dropped[4]." We think it must be said that a right of insurgents to claim the recognition of their belligerency as distinct from the recognition of their independence has not yet become a legal one, either by

[1] T. 2, p. 213. [2] § 5, p. 34. [3] § 26, p. 87.

[4] Hall, § 5, p. 34. In 1806 and 1848 the United States congress passed Acts for paying their shares of the expected compensation to the captors or their representatives in advance, as being due to them from the government on account of its non-feasance: Lawrence's *Wheaton*, pp. 41, 42.

the consent of approved authorities or by custom, though much may be said for it on the ground of reason when even those who deny its legal character can represent the consequences which might follow from its refusal as being inhuman.

It has been said that some belligerent rights may be allowed to insurgents while refusing others, and an instance of a partial recognition of belligerency may be given in the conduct of the British government with regard to the rising of the congressional party in Chili against President Balmaceda in 1891. The insurgents had possession of certain ports, and though their strength was mainly in the fleet, which had taken their side, the substantial character of their movement, which was ultimately successful, cannot at any time have been doubted. They proclaimed a blockade of Valparaiso and Iquique, and the diplomatic representatives of Great Britain, Germany, France and the United States protested against it: Mr Kennedy to Lord Salisbury, 22 January 1891. But the Foreign Office, on 24 January, informed Messieurs Smith and Service, British shipowners, by telegraph that "assuming effective blockade to exist, escort through it cannot be given." The insurgents did not enforce their blockade against foreign vessels, but in February the British admiral Hotham recognised the right of the insurgents to capture foreign vessels for the carriage of contraband of war, and the representatives of the other powers seem to have acquiesced. Yet Great Britain declined to accept the Chilian government's repudiation of its responsibility for the acts of the insurgent fleet, and to put the Foreign Enlistment Act in force in British ports[1]. Of course the lawfulness of a partial recognition of belligerency, if admitted, will be a decisive argument against the existence of a legal duty to recognise belligerency.

The great degree in which a recognition of insurgent belligerency depends on the judgment of the recognising state, which must be passed at least as to the existence of a real war even if it should be held that there is no option where such existence is clear, makes it highly expedient that the

[1] Rev. Dr Lawrence on *Recognition of Belligerency considered in relation to Naval Warfare*, in the *Journal of the Royal United Service Institution* for January 1897, quoting British Parliamentary Papers, Chile, no. 1 (1892).

recognition should be made formally, as by a declaration of neutrality. Hall goes so far as to say that a formal notification of some kind must be issued[1], but this does not appear to be strictly necessary.

"Recognition of belligerency," says Hall, "when once it has been accorded, is irrevocable," on the ground of the new legal relations which it sets up as between the recognising state and third parties[2].

The Recognition of New States arising from Insurrection.

When insurgents aiming at separation have established a state occupying a certain tract of territory with supreme authority and a good prospect of permanence, the question of the recognition of the new state by foreign powers arises. They will find that intercourse with the local authorities, of a more regular and political kind than can be supplied by the expedients resorted to during the earlier stage of the insurrection, is necessary for their interest and that of those of their subjects residing in the territory or trading with it. The new authorities, in the position which they have achieved, will probably decline to tolerate irregular expedients any longer, and the old government, being dispossessed in that part of its territory, will be unable to supply the need. In these circumstances the case of necessity will have arisen which, by depriving the recognition of all gratuitous character, will take from the old government all reasonable ground for offence at it. It cannot be expected that foreign powers shall wait till the old government has itself made such recognition, or even till it has withdrawn from all armed contest if there is no reasonable chance of its success in that contest. When the United States and England recognised the Spanish American republics Spain still maintained small forces at a few points in her vast former possessions, but their recognition was not further postponed by England except in the case of one of them, and there only because of the internal instability of the new government.

What has been said of the acquisition of independence by

[1] § 5, p. 38. [2] § 5, p. 37.

insurrection will apply, *mutatis mutandis*, to the case of a semi-sovereign state shaking off its dependence on its superior. It has been said above that between two states so related to one another war is theoretically possible, and, if the movement is not made by individual insurgents but by the dependent state in its corporate organisation, there can be no more question about the recognition of its belligerency than there is when two independent states go to war with one another. In such a case a state of international law, though a semi-sovereign one, has made war, which it can do, however it may be under a contractual obligation not to do it. If the issue of the contest should be favourable to the once semi-sovereign state, the recognition by other states that it has achieved independence or full sovereignty will be subject to the same considerations as have been explained for the case of an ordinary insurrection aiming at separation.

Continuity of States through Changes of Government.

The government of a state is distinct from its person, it is only the agent of the state person, and according to modern views this is so even when the head of the government is a monarch in whose name treaties, declarations of war or neutrality, and other acts of international life are made. Consequently a state preserves its continuity, and its engagements and obligations towards other states, as well as theirs towards it, remain unaltered, notwithstanding a change of government even so radical as one from a monarchy to a republic or conversely. It is rather by an application of this principle than by an exception to it that if a monarch assumes a higher title, as if a grand-duke should take the title of king or a king that of emperor, he does not thereby raise himself in the scale of international precedence. The rank of a state is part of its relation to other states, and without their consent is not affected by a change of internal designation.

When a change of government is effected by violence, a reasonable time must be allowed to other states for judging of the stability of the new government, before accrediting ambassadors or other diplomatic agents to it or receiving them

from it. In this point the principle which is admitted as to recognising a new state applies equally to recognising a new government. Revolution might be followed by counter-revolution, new engagements prematurely contracted might be repudiated, and the continued existence of old engagements prematurely cancelled might be asserted. In the meantime necessary non-political business may be carried on, diplomatic representatives remaining at their posts or leaving them in the charge of agents of lower official rank. Even political business may be carried on through the stage of negotiation, though if the result of the negotiation were embodied in a treaty, exchange of notes, or other binding form, that would amount to a recognition of the new government, and such a step would not be taken until the foreign power was satisfied of its stability. Thus on the fall of the monarchy and the proclamation of a republic in France in 1792, the British ambassador, though not accredited to the new government, was not at once withdrawn from Paris, and a French ambassador remained in London until he was dismissed upon the execution of the king, on which France declared war, breaking off the political negotiations which had been proceeding without a recognition of the republic.

Continuity of States through Changes of Territory.

When a province is ceded by one state to another, the continuity neither of the transferor state nor of the transferee is affected. The treaties of each normally remain in force, and will operate in future for and only for the respective territories as newly arranged, though the transfer may amount to so great a change of circumstances that a particular treaty, still applying in the letter, can be no longer regarded as applicable in fact. Thus it is conceivable that a state which had guaranteed, or joined in collectively guaranteeing, the neutrality or inviolability of another state, might be so reduced in strength by the loss of territory that the performance of its guarantee could no longer be fairly expected from it. On the same principle, when a state is extinguished and its territory incorporated with another state,

the continuity of the annexing state and the obligation of its treaties are unaffected, and the treaties of the extinguished state fall to the ground.

So far as the interests of individuals may be affected by a treaty of the transferee or annexing state on the one hand, or by one of the transferor or extinguished state on the other hand, since each is the treaty of the state and its consequences to individuals are only incidental, the population of the transferred or annexed territory will lose both the benefit and the burden of the treaties of the transferor or extinguished state, and will gain the benefit and come under the burden of those of the transferee or annexing state. Thus a treaty of 1760 between France and Sardinia, relative to the execution in either country of judgments rendered by the courts of law of the other country, is now operative in favour of the execution of French judgments throughout Italy, and in favour of that of the judgments of all Italian courts in France. Thus also "on the incorporation of the kingdom of Hanover in the Prussian monarchy, in 1866, the Hanoverian treaties of amity, commerce, navigation, extradition, and copyright ceased to exist. They were replaced by the Prussian treaties on the same subjects[1]." It is said that on the incorporation of Texas with the United States England and France hesitated to admit that their commercial treaties with the former had fallen to the ground. If that is so, at least the objection, which may have been founded on a failure to perceive a true incorporation through the veil of a quasi-federal union, was not pressed; and on the annexation of Madagascar by France, both England and the United States admitted without difficulty that they could no longer claim the benefit of the Malagasy tariffs which had been arranged by conventions with them.

There is a class of treaties called transitory or dispositive which may seem to be an exception to the rule that the treaties of the transferor or extinguished state cease to operate in the ceded or annexed territory, but which may as easily be represented as not being really an exception. These are treaties which dispose of or about things by transferring or creating rights in or over them, as a deed conveying a field or granting

[1] 1 Rivier 73.

a right of way over it disposes of or about the field by transferring the property in it to the purchaser or creating the right of way over it in the grantee. Such are treaties of cession, by which the sovereignty in a territory is transferred by one state to another, and those by which a territory is subjected to a servitude or easement, as the treaties of 1815 by which northern Savoy was declared perpetually neutral, thus creating in it a servitude of neutrality in support of the neutrality of Switzerland. Documents of title of this class, whether in private or in international law, are called transitory, because their effect passes over (*transit*) into and forms a part of the body of rights concerning the thing in question, so that it is possible in subsequent dealings to start from that body of rights as a fact, without being obliged always to refer to the dealings which created it, as it would be necessary to refer to an ordinary contract every time that its performance had to be claimed in a fresh case. But the term is a bad one, because the associations usually connected with the word "transitory" cause it to suggest a fleeting character for documents of which the operation is really the most permanent, and the best term to use is "dispositive." Now a transferee or annexing state takes the territory as it stands, that is, subject to all the rights which have been impressed on it in favour of third parties by the treaties which have disposed about it; and by virtue of this possibility of looking only at the rights as they stand, without going behind them to the documents of title, dispositive treaties may be represented as not being an exception to the general rule. Rivier says that "the successor can denounce the servitude, for treaties establishing servitudes must be ranged among those which, although dispositive, are considered as concluded *rebus sic stantibus*[1]." This however seems too wide a proposition. It would have to be shown that the interest of third parties which the servitude was intended to secure had ceased to exist in consequence of the change of sovereignty over the territory which it affected, and it would be difficult to show this in such a case as that of the Swiss, and European because Swiss, interest secured by the neutrality

[1] 1 Rivier 73.

of northern Savoy, which we must therefore hold to be obligatory on France as the successor in that region.

The principle that a transferred province is taken as it stands leads to the conclusion that it must continue to bear its provincial debt. The transfer does not change the security for that debt, nor would it be just that it should do so, the loan having presumably been contracted for provincial purposes. As to the general debt of the state which loses the province, the maxim *vae victis* has usually prevented the acquiring state from assuming a part of it proportioned to the resources of the transferred territory, and this has been justified on the ground that at the end of a war the financial relations between the states concerned are settled in fixing the amount of the indemnity exacted by the conqueror. There have however been some recent exceptions. In 1860, Italy, annexing a part of the Papal States, took on herself a part of the Papal debt, by an arrangement which was made with France because the pope declined to give any kind of sanction to the dismemberment of his territory; and in 1866 Prussia, on the annexation of Sleswick-Holstein, assumed a part of the debt of Denmark. The fundholders have no legal claim on the acquiring state beyond the part of the debt, if any, so assumed, unless their contract gave them a specific security on the revenues of the ceded province, or on state property in that province which passes by the cession. They must look to their debtor, whose continuous identity is neither extinguished nor shifted by the cession.

But as to the moral claim which may exist where a cession seriously cripples the ability of a state to meet its general debt, as well as the legal claim existing where the revenue of the ceded province or property passing by the cession has been given as security, it will be well to refer to the views expressed on behalf of the United States on the termination of the war between Chile and Peru, the former ceding to the latter territory rich in guano and nitrates. Mr Frelinghuysen, Secretary of State, wrote to Mr Phelps, the United States minister in Peru, 25 August 1883: "It seems to be essential to a just and lasting peace either that Peru should be left in a condition to meet obligations towards other governments which were recognised prior to the

war[1], or which may be legitimately established, or that if Chile appropriates the natural resources of Peru as compensation for the expenses of the war, she should recognise the obligations which rest upon those resources, and take the property with a fair determination to meet all just incumbrances which rest upon it[2]." And again, on 29 December 1883: "The opinion of the United States heretofore has been that as the foreign obligations of Peru, incurred in good faith before the war, rested upon and were secured by the products of her guano deposits, Chile was under a moral obligation not to appropriate that security without recognising the lien existing thereon[3]." There was perhaps no necessity to qualify the obligation as moral, where the guano deposits had been pledged as security.

The Extinction of States.

A state may cease to exist either by voluntary arrangement or by conquest.

The constituted authorities of a state, whether its executive government or a body in the nature of a parliament, must be considered as having their various functions entrusted to them in order that they may be exercised in carrying on the state as it exists and not in extinguishing it or fundamentally altering its character; and it is therefore impossible that the extinction of a state, or even its union with another state on terms involving the loss of its separate existence as a state of international law, can ever be effected by voluntary arrangement in a constitutional manner. This is so, even when the extinction or union is voted by a parliament which for all purposes comprised in carrying on the state as it exists is regarded as omnipotent. The extinction or union may however have a moral sanction from the approval

[1] This allusion is perhaps explained by the following: "In treaty of peace between Chile and Peru provision must be made for recognition by Chile of Landreau's claim as a prior lien upon any territory which Peru may be required to cede to Chile." Mr Blaine, Secretary of State, to Mr Hurlbut, 4 August 1881: 1 Wharton 359.

[2] 1 Wharton 348. [3] *Ib.* 350.

which the act of the constituted authorities effecting it meets with from the body of the people, and such approval may be most convincingly manifested by a popular vote, or by an election *ad hoc* of the parliament or other authority which takes on itself to effect the desired end, although it cannot be said that the mere notoriety of the popular sentiment will be an insufficient justification. If the state is extinguished, as England, Scotland, and Ireland have been respectively extinguished as states by their incorporate union in the United Kingdom, or Texas by her incorporate union with the United States, the personality of the community perishes with it, and, whatever form may have been given to the arrangement, there can be no real treaty for want of persons to contract. The observance of any stipulations that may have been made can in such a case be only a matter of conscience for the government resulting from the incorporation. In estimating the conscientious duty it will have to be remembered that the population of each incorporated area will not necessarily represent the state which once existed in it. There may have been emigration and immigration, and even between successive generations on the same soil the moral unity will have been impaired by the absence of a separate state tie as the connecting link. The new government will therefore have to act on a comprehensive view of the situation as from time to time it will present itself. Less freedom than this in dealing with stipulations from which, since there is no legal tie, there can be no legal release, would be incompatible with the nature of a moral being; and the parties which have sunk their own existence must be considered as giving the full attributes of a moral being to the state which they have set up in their place. If the uniting states only lose their separate characters of states of international law, as Austria and Hungary or Sweden and Norway, there may be a real treaty between them.

The extinction of a state by conquest will take place when the conquering power has declared its will to annex it and has established its authority throughout the territory, any opposition still made being on the scale of brigandage rather than of war, and no corner remains in which the ordinary functions of government are carried on in the name of the old state. In this case as well as in that of voluntary arrangement,

and for the same reason, the constituted authorities, whether executive or legislative, to whom in this case may be added the generals commanding the troops, can give no legal sanction to the extinction, though the generals may contribute to the result and spare much suffering to their own people by a capitulation. A sanction may be sought in a popular vote or the election *ad hoc* of an assembly, but it would have little value even morally, since it would only register the fact that resistance had become hopeless. England proclaimed the annexation of the entire territories of the South African (Transvaal) Republic and Orange Free State before their conquest had in fact been completed, but the fixed resolve to complete it had been declared, and had been carried so far into execution that the final result was not in doubt. At the same time large tracts of country were in British occupation in which the ordinary functions of government had to be provided for, all Transvaal or Free State authorities having left them, and in those circumstances it would have been idle to establish an administration for them, whether of justice, finance, or any other department, in any name but that of the Queen. The proclamation therefore may well be justified, although it would have been unfair and improper to apply the penalties of rebellion to troops still holding out in the field, or to civilians assisting them outside the British lines.

With regard to the attitude to be adopted by third powers, a conquest, like the coming into being of a new state, is a fact which cannot be long ignored without offence to those in whose favour it occurs, yet which cannot be hastily forced on the acceptance of other members of the international society whom it may affect. These must have a reasonable time to appreciate the facts alleged, and to study them in connection with their own rights and interests, which may require some safeguard or acknowledgment on the occasion. Thus a judgment has to be passed which belongs to the political organs of a government. If a case were brought before a court of law which depended on an alleged change in the international condition of a certain piece of territory, whether by the acquisition or extinction of state existence or even by partial cession, and whether the change alleged affected the state to which the court belonged

or only foreign states, no evidence, however cogent, could absolve the court from being bound by the decision of its own government as to the change alleged.

A state may be extinguished by a conquest made by several powers in concert, as happened to Poland in 1795 on its last partition between Russia, Prussia, and Austria. Or it may happen that different powers may seize without concert different portions of the territory of a state undergoing extinction, as France occupied part of the Khalifa's territory at Fashoda while his power was being destroyed by the British and Egyptians at Omdurman, but he with some of his forces was holding out. In the latter case it seems impossible to say that the occupation of the capital, or of the larger part of the territory, so far completes the conquest as to give a title to the whole against a third power occupying another part. But in the instance mentioned, since the abandonment of the region by Egypt had never been complete and definitive, the title of the restored Egyptian government was superior to that of either England or France by conquest, and is the one which after the fall of the Khalifa was practically relied on and set up, while the incident with France was terminated in such a manner as to furnish no precedent for the case of concurrent but not concerted conquests.

Consequences of the Extinction of a State.

Of the consequences which follow the extinction of a state some result simply from the continuity of the annexing state before and after the annexation, or from the continuity of the legal condition of the territory in all but what concerns the sovereignty over it, and as these correspond to the consequences which follow from a transfer of territory by partial cession, in which case a third continuity, that of the ceding state, is added, they have already been noticed in speaking of the *Continuity of States through Changes of Territory.* Thus the treaties of the extinguished state fall to the ground, with the exception, if exception it be, of transitory or dispositive ones, but, so far as the interests of individuals are affected, the annexed population gains the benefit and comes under the burden of the treaties of

the annexing state[1]. Thus also the annexing state takes the territory as it stands, subject to the servitudes which transitory or dispositive treaties have impressed on it. And another result, the same for the territory of an extinguished state as for a ceded territory, is that the law of the land which changes masters—civil, criminal, and administrative as distinct from

[1] This is not undisputed, and the principal authorities are thus summed up by Ullmann, pp. 71, 72. "There is," he says, "a difference of opinion about the treaties of commerce, navigation, extradition, etc. of an annexed state. According to one view these treaties fall to the ground, like those of alliance and political amity. According to another view 'the annexing state must consider itself bound by all the commercial and other international conventions which bound the annexed state' (1 F. de Martens, 369). A third view holds a general answer to this question, founded on principle, to be impossible, and leaves the nature and scope of the convention and the concrete circumstances to decide." For the first opinion Ullmann quotes 1 Rivier 72; Hartmann's *Institutionen des Europäischen Völkerrechts in Friedenszeiten*, 1874, p. 35; and Despagnet, § 91, who thinks that the political and economical treaties of the annexed state fall to the ground, yet on the other hand that a specially agricultural annexing state could not claim that its commercial treaties should be applied to a chiefly industrial territory annexed by it. For the third opinion the authority given is 1 Calvo, § 98; and a reference is added to Bluntschli, § 50, who says that "the rights and obligations of an annexed state pass to the state which annexes it, whenever their maintenance is possible and can be reconciled with the new order of things." This Ullmann regards as much too elastic a limitation, but I do not find that for himself he says anything more definite than, after enumerating as on p. 60, above, the Hanoverian treaties which were held to cease on the incorporation of Hanover with Prussia, that "all treaties of that kind ought not to be treated alike." Max Huber, § 56, declares himself frankly for the first opinion, and so does Hall, § 29, p. 105; nor does the point seem to us to admit of much doubt. Every international treaty supposes international persons as parties to it; the annexed state has ceased to be such a person, and the annexing state, as we shall see, cannot be regarded as continuing its person; and the third opinion encounters the further difficulty that it furnishes no means of authoritative decision in any particular case. A like incurable vagueness may be objected to Despagnet's limitation of the application of the commercial treaties of the annexing state to the annexed territory, not to mention that it would encourage raising questions on the occasion of insignificant geographical accessions. The treaties of the annexing state must apply, subject in sufficiently grave cases to be denounced as wholes, and not merely for the territory newly brought under them.

political—remains unaltered until the new master, by express legislation, either modifies it in detail or replaces it by the law of his own land. But there are consequences of a more complex nature which demand treatment in a separate section.

State Succession: General.

The title by conquest has its base in the force by which a thing or a tract of land is seized, and by which the actions of a population are controlled. But it must always have been felt that the title so gained cannot be limited to the extent covered by the *de facto* basis. The incorporeal rights of the displaced government, and the allegiance of its subjects who are outside the annexed territory but maintain their connection with it, are claimed by the conqueror although they elude seizure by him. Nor could it be satisfactory that the rights acquired through the extinction of a state by conquest, having so much in common with those acquired by a partial cession of territory, should be placed baldly on a *de facto* title not existing in the latter case. Hence has arisen the idea of the succession of state to state as an institution of international law comparable to succession on death as an institution of private law, each bringing under one head a number of relations of property and obligation, and applying to them rules not found elsewhere but arising from the point of view peculiar to the institution. The existence of such an institution in a concrete case is set up by some investitive fact, as the death of the ancestor investing the heir, or the conquest or cession investing the acquiring state, and in that way justice is done to whatever of a *de facto* nature may lie at the base of the title, while the variety of the investitive facts in the cases of conquest and cession affords play to the varieties of which the institution is susceptible. The resemblances and differences of those cases have already been glanced at. To put them more fully, the points of resemblance are the change of sovereignty over the acquired territory, the continuing and unaffected identity of the acquiring state, and the continuing and unaffected legal condition of the acquired territory as a field for modern civilised life. The point of

difference is that in the milder case the ceding state is there to assist in shaping the succession, while in that of conquest the succession must shape itself as it can, subject to the duty of not interfering with the continuance of modern civilised life in the territory.

The Roman idea of succession on death in private law was the continuation of the deceased's person by the heir, and it was borrowed by Grotius without modification as the idea of state succession. *Haeredis personam*, he says, *quoad dominii tam publici quam privati continuationem, pro eadem censeri cum defuncti persona, certi est juris*[1]. This occurs in a chapter not dealing with hereditary succession in a monarchy, but with the question *quando imperia vel dominia desinant.* But that the successor state, coming in with its own notions of government and with freedom to apply them, cannot properly be considered as continuing the person of the displaced state, was seen as early as by Cocceji, who wrote in his commentary on Grotius: *Negamus in successionibus regnorum successoris personam pro eadem censeri cum persona defuncti*[2]. The true doctrine therefore seems to be that of Max Huber, who, recognising that his point of view is the same as that of Cocceji, writes thus:

"The notion of succession is a general one in law, and belongs exclusively neither to private nor to public law. Succession is substitution *plus* continuation. The successor steps into the place of the predecessor and continues his rights and obligations; so far the successions of private and public law agree. But we now have to distinguish between those kinds of succession. A civil successor who steps into the place of his predecessor steps into his rights and obligations as though he were himself the predecessor. That is the universal succession of private law in the Roman sense, at least according to the prevailing doctrine. But the successor of international law steps into the rights and obligations of his predecessor as though they were his own.....State succession is substitution *plus* continuation *quoad jura*, not *quoad defunctum*[3]."

State Succession: Persons.

The first application which we shall make of what we conceive to be the true doctrine shall be to the effect which

[1] Grotius, 2, 9, 12.

[2] Quoted by Max Huber, *Die Staaten-Succession*, Leipzig, 1898, note 42.

[3] Max Huber, u. s., §§ 23, 25.

state succession has on the allegiance or nationality of the persons inhabiting the acquired territory or in one way or another connected with it; in other words, the question of man as an object of state succession.

It cannot be doubted that the nationals of an extinguished state who continue to reside in the territory, or who, not being within it at the moment of the change, return to it for any but a temporary purpose, become the subjects of the new government. They do so by accepting its rule and protection, even if the succession did not of itself comprise them among its objects. But what of the nationals of an extinguished state who were not within its territory at the moment of the change, or leave it after the change without any undue delay, repudiate any tie to the conqueror, and do not return to the territory except for the removal of their goods or some other such temporary purpose? The decisive consideration appears to be that allegiance is a purely personal tie, and therefore cannot be claimed by the successor state, which is not identified in person with the extinguished state, merely on the ground that it was due to the latter. If the individuals in question do not get themselves naturalised elsewhere, they can have only the legal position which the state in which they reside grants to resident aliens, and such an international position as depends on residence. That *deminutio capitis* they cannot avoid. But this view has not always been taken. Rivier says that the rule that the nationals of a conquered state become the subjects of the conqueror, and can be treated by him as such notwithstanding that they have become naturalised elsewhere, was anciently practised in all its fulness, as by France under the first republic[1]. And he quotes the case of the Count von Platen-Hallermund, a Hanoverian who emigrated on the conquest of his country by Prussia, and who was nevertheless found guilty of high treason in 1868 by a Prussian court, a judgment condemned by Zachariae and Neumann. But, as he points out, this precedent was not followed in 1869, when some young men of Frankfort, also conquered by Prussia, who had naturalised themselves in

[1] But on the annexation of the republics of Mulhouse and Geneva the inhabitants were allowed to avoid becoming French on condition of emigration. Cogordan, p. 291.

Switzerland in order to escape military service, were expelled instead of being obliged to perform such service. And he sums up to the effect that the old rule is inconsistent both with sound policy and with the increasing tendency to emancipate men from the soil, shown by the general liberty of emigration and the regular use of the clause of option in cessions of territory, but that international law is not yet fixed on the subject[1].

If the case is one of partial cession, of which the recognition of the independence of a part split off is for this purpose only an instance, the ceding state performs in making the cession a last act of sovereignty over its subjects connected with the ceded territory, and is as well entitled to do so over those absent from it as over those present in it. Anciently cessions were carried into effect on the footing that the allegiance both of the present and of the absent was transferred by that means without an option being given, which is said to have been done for the first time by the capitulation of Arras in 1640, but the established practice has long been to fix a time within which individuals may, formally or practically, opt for retaining their old nationality, on condition of removing their residence from the ceded territory[2]. The succession then comprises all those individuals, whether present on the ceded soil or absent from it, who fall

[1] 2 Rivier 438, 439; quoting, for the Count von Platen-Hallermund's case, Holtzendorff's *Allegemeine Deutsche Strafrechtszeitung*, 1868, t. 1, § 12, and for the memoirs of Zachariae and Neumann on it, Stoerk, *Option und Plebiscit*, pp. 150-155.

[2] There are cases in which this condition has not been imposed, because it would have had no political importance, as the cession of California by Mexico to the United States in 1848. Previous to the Treaty of Utrecht (1713) it was usual to require those who opted for emigration to sell the real property which they had in the ceded territory, and there are examples of this as late as the Treaties of Campo Formio (1797) and Amiens (1802). There is even one in the case of the cession of a part of Bessarabia made by Turkey to Russia in the Treaties of San Stefano and Constantinople (1878 and 1879), but this, as Cogordan remarks, may have been due to the peculiar conditions of the territory in question. The treaties of 1814 gave an option to the inhabitants of the territories ceded by France; but in France and the Netherlands, though not in Prussia, an interpretation prevailed which was based on the system that the extension of the limits of France had only been an illegal usurpation. As to all the topics of this note see Cogordan, pp. 300–322; Despagnet, § 336.

within its terms as shaped with the concurrence of the ceding state.

In the last paragraph we have spoken of "subjects connected with the ceded territory," but we must now enquire more closely who the individuals are whose allegiance is transferred if they do not opt for their old nationality and fulfil the conditions stipulated for the validity of their option. This, as we have said, depends on the terms of the cession, but two rival principles have dictated those terms in different cases. One, and the older of the two in this application of it, is the principle of domicile. It is the subjects of the ceding state domiciled in the ceded territory, whether present in it at the moment of the change or not, who are *prima facie* comprised in the cession, and must opt and fulfil the other conditions if they are to escape the transfer: those subjects who at the moment of change are not domiciled in the ceded territory, even though present in it or having at a previous date been connected with it, are not concerned in the transfer. This was the common law, as laid down by Pothier for France[1] and by the English courts for this country[2], and carried out in the treaties, among others, of Ryswick, Utrecht, Campo Formio and Zurich, in all which the terms used are inhabiting (*habitant*), dwelling (*demeurant*), or residing (*résidant*), terms which, for want of any other precise definition, must be and are in such cases understood in the legal sense of domicile. The other principle is that of place of birth, which, if adopted, causes the subjects of the ceding state born in the ceded territory, whether present in it at the moment of change or not, and no others, to be *prima facie* comprised in the cession. The treaty of Turin (1860) applied both principles, transferring to France all those Sardinian subjects who were either domiciled or had been born in Savoy or Nice, in default of option and the establishment of their domicile in Italy if it was not already there. The term used in the treaty to express birth in Savoy or Nice is *originaires de*, which in private law usually means connected with a place by parentage as contrasted with domicile, but in

[1] *Traité des Personnes*, 1re partie, titre 2, sect. 1re.

[2] *Doe* v. *Acklam*, 2 B. & C. 779; *Doe* v. *Mulcaster*, 5 B. & C. 771; *Doe* v. *Arkwright*, 5 C. & P. 575; *re Bruce*, 2 C. & J. 436, 2 Tyr. 475; *Jephson* v. *Riera*, 3 Kn. 130.

diplomatic language refers to the place of a person's own birth, irrespective of any questions about his ancestors[1]. By the treaty of Frankfort, 10 May 1871, combined with the additional convention of 11 December 1871, the same system was applied to the cession of Alsace-Lorraine which had been applied to that of Savoy and Nice[2]. In the cession of the island of St Bartholomew by Sweden to France, 1877, the principle of domicile without reference to place of birth was reverted to; and this seems to be the system which carries the best presumption of defeating the wishes of the fewest persons.

In cases of cession, those who opt for their old nationality and fulfil the conditions attached to the option must be considered as never having lost that nationality. What nationality is to be provisionally attributed to those for whom the option remains open may depend on the terms stipulated, or perhaps on the purpose for which the question has to be asked, but since the number of options which are carried through is never so great as that of the persons whose nationality is ultimately changed, there would appear to be less inconvenience in treating the new nationality as the provisional one, except for purposes, like military service, which will bear a little delay and for which a wrong attribution would be a hardship.

With regard to the option which in cases of cession may be allowed to married women, or to minors with or without the approval of their parents or guardians, to the question whether the time for option will run against a minor, and to that of the

[1] This diplomatic sense was recognised by the tribunal of Lyons, in a judgment of 24 March 1877 on the nationality of an *originaire* of Savoy; Cogordan, annexe F; and by the German government, in a communication made by its ambassador at Paris to the French government on 18 December 1871; Cogordan, pp. 342, 343. It is scarcely disputed by Cogordan and is admitted by Despagnet, § 335; but the French government had put to Germany the question what she understood by it in the treaty of Frankfort, and was answered by the communication mentioned.

[2] There was much dispute about the interpretation of these documents, and certainly Art. 2 of the treaty was badly expressed, but in spite of the high authority of M. Cogordan we think that the Count von Arnim's despatch of 1 September 1872 gives the correct view, and that which must have always been entertained by the German government. See Cogordan, pp. 340–346, and for the cession of St Bartholomew, pp. 376–9.

effect which the option of a husband or parent will have on the nationality of his wife or minor children, the legislations of different countries differ so widely on the analogous questions arising on naturalisation that a general agreement cannot be expected[1].

State Succession: Things and Civil Obligations.

It is generally agreed that the rules of state succession as affecting the right to things and other civil rights are the same in the case of the extinction of a state as in that of a partial cession of territory. Such rights do not depend for their existence on the person of the state under, by or against, which they exist, and therefore do not fall to the ground by the extinction of that person. On the other hand, the mode of their existence may be affected by their coming into relation with a new public person, who will act according to his own views of public policy, but that change takes place equally, whether the public person with which the rights in question were formerly in relation is extinguished or retires by cession. Hence the Transvaal Concessions Commissioners, who had to deal with rights of a mixed public and private nature granted by the displaced government, said in their report: "In considering what the attitude of a conqueror should be towards such concessions, we are unable to perceive any sound distinction between a case where a state acquires part of another by cession and a case where it acquires the whole by annexation[2]." Hence also the rules which we shall proceed to consider must be understood as applying equally to conquest and to cession, unless it is otherwise expressed.

First, the purely private rights of individuals, whether of property or of obligation, are untouched by the change of government.

Secondly, the acquiring state succeeds to the entire position of the displaced state as owner of the assets, or what is called the active succession. And this rule extends by analogy to the case of the complete overthrow of one of the parties to a

[1] See *re Bruce*, 2 C. & J. 436, 2 Tyr. 475.

[2] Parliamentary Paper, Cd. 623, p. 7.

civil war, in which case there is an extinguished government though not an extinguished state. It was applied by the English courts to the cotton in England belonging to the government of the Confederate States, which was held to pass by their overthrow to the United States, subject to such right of account against the latter as the holders of it would have had against the former. Without that qualification, it would not have been the entire position of the displaced government as owner of the assets to which the acquiring state would have succeeded: the maxims, *res transit cum suo onere*, and *bona non intelliguntur nisi deducto alieno*, would have been violated[1]. In consequence of this rule the fortresses, arsenals, and other objects belonging to the displaced state in the territory which changes masters pass to the acquiring state unless specially excepted by the treaty in a case of cession. So also the incorporeal rights of the displaced state connected with the territory, and, if that state be extinguished, its property and rights of action abroad, as for example ships and bank credits.

Thirdly, the acquiring state is affected by what is called the passive succession, in other words it steps into the civil liabilities of the displaced state, though of course, in the case of a partial cession, only into those of them which exist in connection with the ceded territory. That doctrine, for the case of conquest, was expressed as follows by Mr Adams, Secretary of State of the United States: "The conqueror," he wrote to Mr Everett, 10 August 1818, "who reduces a nation to his subjection receives it subject to all its engagements and duties towards others, the fulfilment of which then becomes his own duty. However frequent the instances of departure from this principle may be in point of fact, it cannot with any colour of reason be contested on the ground of right[2]." This must be

[1] The United States did not submit to the account, and therefore failed to get the cotton; but that must be attributed to the bitter sentiment engendered by the secession and the war rather than to any serious doubt as to the doctrine. See for the general doctrine the language of Vicechancellor Cranworth in *King of the Two Sicilies* v. *Willcox*, 1 Sim. N. S. 327–9; of Vicechancellor Wood in *United States of America* v. *Prioleau*, 2 H. & M. 563; and of Vicechancellor James in *United States of America* v. *McRae*, L. R., 8 Eq. 75.

[2] 1 Wharton 19.

understood of civil engagements and duties, that is those enforceable in courts of justice, or which would be so enforceable if the state in question allowed itself to be sued in its courts: to extend it to international treaties would be contrary to the rule which has been already noticed[1]. But it may be asked whether the liability of the acquiring state for the obligations of its predecessor is unlimited, and whether it is without exception.

On the first of those questions it is rare to find an express statement. Max Huber however lays it down that the liability of the successor state is without benefit of inventory, that is without a limitation to the value of the assets received, and gives the following reasons for his opinion. The benefit of inventory is contrary to the idea of succession, and was a late introduction into Roman law. The case against it is stronger in the succession of a state, which comes in by its own will, than in that of a private successor. The assets received cannot be valued, including as they do the taxable capacity of the territory and population changing masters. And, which for Max Huber is the decisive consideration, the whole of the assets pass as an inseparable consequence of the succession, and the passive is an inseparable accompaniment of them[2]. This reasoning is not altogether satisfactory. The benefit of the inventory exists in Roman law, as the latter has stood ever since international law had its commencement. A private successor is not bound to accept the succession, so that he also comes in by his own will. That the assets cannot be exactly valued does not prove that there is no reasonable limit to them. And whether the passive is without limitation an inseparable accompaniment of the assets is the very point to be proved. A more solid consideration appears to be that either the annexed territory and population will be so merged in the possessions of the annexing state that their taxable capacity will not easily be identifiable, so as to furnish the measure of a limitation, or, if they are maintained as a distinct unit for fiscal purposes, the annexing state may for its own political objects refrain from imposing on them the full amount of taxation which they could bear. But the conduct of the annexing state suggested as possible in the

[1] Above, pp. 59, 60.

[2] Max Huber, u. s., § 232.

latter case can scarcely be presumed, and perhaps the safest conclusion is that if the territory changing masters is merged for revenue purposes in that of the annexing state the liability of the latter will be unlimited, but that, if it is maintained as a separate fiscal unit, the obligations of the extinguished state, or those of the ceding state connected with the territory, will not pass over beyond the value of the assets received, including such taxation of the territory as it can reasonably bear without reference to the political convenience of the annexing state. We have seen that in the case of cession the transferred province continues to bear its provincial debt without any change of the security for it[1]; and Hall suggests, correctly as we think, that "local debt and general debt are only different words for the same thing when a state loses its separate existence and is taken bodily in to form a member of another state[2]." There seems therefore no reason why the general debt of an extinguished state should fare better, in point of the future security for it, than the local debt of a transferred province.

A classical case of the extinguishment of a state without its territory being maintained as a separate fiscal unit occurred on the absorption of Texas, an independent republic, into the United States as a state of the Union in 1845. It was agreed that the unappropriated lands within the limits of the republic were to be retained by the state of the Union and applied to the payment of the debts and liabilities of the republic, the residue to be disposed of as the state of the Union might direct; "but in no event were said debts and liabilities to become a charge upon the government of the United States[3]." Of course the last clause could not, as against third parties, free the United States from any liability that might be incurred by them through an absorption by which Texas was deprived of her main source of revenue, the constitution of the Union prohibiting the states from raising a revenue by custom duties. A British holder of bonds of the absorbed republic on which there was default brought a claim against the United States under a mixed commission appointed in pursuance of an Anglo-American

[1] Above, p. 62. [2] Hall, § 29, p. 105.

[3] United States *Statutes at Large*, vol. 5, p. 798.

convention of 8 Feb. 1853 for the adjustment of claims between the two countries. The British and the United States Commissioners gave opposite opinions, and the umpire—a highly respected American citizen, but not a legal expert, Mr Joshua Bates—pronounced that the "commission cannot entertain the claim, it being for transactions with the independent republic of Texas prior to its admission as a state of the United States[1]." It does not clearly appear whether this meant that the United States were not liable or that for some reason the claim was not within the scope of the commission, but Dana has recorded his opinion in favour of the liability. "The entire public system of Texas," he writes, "has passed into other hands, and no such state of things any longer exists as that to which the creditor looked. It may be better or worse, but it is not the same; and if the duties laid by the United States and collected in Texan ports did not in fact pay the debts, it would be unjust for the United States to limit the payment of the creditor to them. The truth is, by the annexation the United States changed the nature of the thing pledged, and is bound generally to do equity to the creditor[2]."

Coming now to the question whether there are exceptions to the rule that a successor state is liable for the obligations of its predecessor, it would seem difficult to hold the conqueror liable, whether with or without benefit of inventory, for a loan which an extinguished state had contracted for the purpose of the war. Those who lend money to a state during a war, or even before its outbreak when it is notoriously imminent, may be considered to have made themselves voluntary enemies of the other state, and can no more expect consideration on the failure of the side which they have espoused than a neutral ship which has entered the enemy's service can expect to avoid condemnation if captured. The principle may sometimes have a wide application. When Cuba was emancipated from Spain by the Spanish-American war, it could scarcely be expected that either she or the United States should recognise the loans which Spain had charged on

[1] *United States Arbitrations,* vol. 4, p. 3594. What is said on p. 3593 should be taken into account in reading the statement of Mr Bates's judgment in 1 Wharton 22.

[2] Dana's Wheaton, § 30, note 18.

her for the cost of repressing the Cubans, during the long and intermittent struggle of which her emancipation was the close[1]. But different considerations apply to the obligations which a state has contracted for the purpose of a war, either by requisitions or the destruction of property not involving the consent of those towards whom the obligation of indemnifying them arises, or by contracts in which the consent of the contractors is involved, but in the way of business and not so as to implicate them as voluntary parties to the struggle. If the state is extinguished, it is not generally thought that there is anything to take such obligations as these out of the rule of the successor's liability; but if the cession is a partial one, the question occurs whether the obligations in question contracted in the ceded province ought to be regarded as local, so as to pass to the state which acquires the province, and not rather as those of the ceding state, in whose interest the war must be considered to have been waged.

By Art. 8 of each of the Treaties of Zurich and Vienna, by which Italy acquired Lombardy and Venetia respectively from Austria, she undertook as towards Austria to satisfy the local obligations of those provinces. After the former treaty, on 16 August 1860, the Italian Minister of the Interior issued a circular stating that "the government assumed the engagement,

[1] In an interesting article contributed to the Berlin periodical *Die Nation* of 22 April 1899, von Bar arrives at the conclusion that Cuba, whether her position—at that time uncertain—was to be more or less independent of the United States, would remain liable for so much of the loan money charged on her by Spain as had been spent on railways, harbours and other works of civilisation for her benefit, but that neither Cuba nor the United States would be liable for so much as had been spent in maintaining her dependence by force. Spain too would be bound to furnish both to the victors and to her creditors, from her archives, the information necessary for so dividing the debt. In the same article von Bar points out that even where a debt remains chargeable on a ceded province or a conquered territory the new government cannot be fettered in its control of the taxation, or be obliged to admit the interference of an agency introduced by the displaced government; and that therefore a specific security on the customs levied within the province or territory by the state to which it belonged, and a stipulation for the payment to a particular bank of any revenue comprised in the security, must fall to the ground.

and has decided in the council of ministers, to consider compensation for the losses caused by the requisitions regularly made by the Austrians in Lombardy as a charge on the state[1]." The Italian courts however, while admitting that this would be the rule in the case of the total incorporation of a state, as happened to Tuscany and Naples, hesitated to lay it down for cases of partial cession until the Court of Cassation of Florence declared, by a judgment of 30 March 1877, that "by public law the state which succeeds in a part of the territory of another state is bound, independently of special conventions, by the obligations legally contracted by the latter in relation to the territory in which it succeeds[2]." The point was raised again in an action against the ministry of finance for the price agreed on with the Austrian government for the execution of certain works of fortification about Venice, and the same Court of Cassation, by a judgment of 25 May 1896, while saying that it might have been doubted whether the obligation was really incurred for the public interest of the ceded provinces, refused to depart from the interpretation given in previous cases, and decided for the plaintiffs on the ground that the works were designed and executed for the security of the Venetian provinces, though being at the same time useful for the general defence of the state which then exercised the rights of sovereignty in them[2].

By the terms on which the forces of the South African Republic and the Orange Free State surrendered to Lord Kitchener on 31 May 1902, the British government assigned a sum of £3,000,000 "for the purpose of assisting the restoration of the people to their homes" and giving a fresh start in life to those who "owing to war losses" needed it; and all notes issued under Law 1 of 1900 of the South African Republic, and all receipts given by officers in the field of the late republics or under their orders, if found to have been duly issued in return for valuable considerations, were to be received "as evidence of war losses suffered by the persons to whom they were originally given." And it was declared that the government was prepared, in addition to that free grant, to make advances on loan for the

[1] Gabba, *Quistioni di Diritto Civile studiate da C. F. Gabba,* 1882; p. 383.

[2] 2 Holtzendorff 40.

[3] 26 Clunet 864.

same purposes free of interest for two years. But no foreigner or rebel was to be entitled to the benefit of the clause containing the above provisions. With regard to further grants afterwards made Mr Chamberlain answered as follows a question put in the House of Commons: "The payments in respect of depredations by the Boers or of property commandeered by the late Transvaal government during the war are being made as an act of grace and without admitting any liability. The object which the government has had in view in making such payments is to assist individual loyalists who have suffered direct losses during the war in the same way as assistance is being given to Boers under the terms of surrender. Acting on this principle, claims from companies and large firms have not been entertained, and no distinction has been drawn between companies registered in England and those registered in the Transvaal[1]." Thus between the course pursued by Italy after the wars of unification and by England after the South African war the practical difference is not great, but the mode in which the respective results have been arrived at illustrates a difference which the student of international law should notice, as it is found in other parts of his subject. Italy, which may be taken as representing the most modern ways of thought and action, adopted a juridical rule and acted on it; England, a good representative of the older governments, reserved a large part for discretion.

For the sake of the English reader we must here notice the dicta of the Transvaal Concessions Commissioners that "it is clear that a state which has annexed another is not legally bound by any contracts made by the state which has ceased to exist, and that no court of law has jurisdiction to enforce such contracts if the annexing state refuse to recognise them[2]." The latter dictum is true, since courts of law are bound by the will of the sovereign power of the country, whether that will be just

[1] *Times* of 3 April, 1903; "Questions not answered orally."

[2] Parliamentary Paper Cd. 623, p. 7. The commissioners quote the judgment of the Judicial Committee in *Cook* v. *Sprigg* [1899] A. C. 572, on which observations may be made similar to those made in the text on the utterance of the commissioners. See an article on *The Nature and Extent of the Title by Conquest* which we contributed to the *Law Quarterly Review*, vol. 17, p. 392.

or unjust. The former dictum, denying all continuing legal obligation of contracts in cases of state succession[1], is to be explained by the narrow meaning which the commissioners evidently attached to the term "legal," partly from attachment to Austin's narrow definition of law[2], and partly from connecting the term exclusively with the ordinary courts of law, which in England are not the only channels of redress where the Crown is concerned. The legality of a claim, in any but a misleading sense, does not depend on the particular method that ought to be taken in order to enforce it. In any case the dictum was superfluous for the commissioners' object, which was only concerned with concessions presenting, as they observe, "examples of mixed public and private rights." It therefore need not be further dwelt on, but the subject of concessions, where these take the form of privileges of a public nature granted to private parties by the displaced state, is important in the doctrine of state succession.

The succession of a state to its predecessor is qualified by the circumstance that it is the public law and policy of the successor which are to prevail in the future, as being inseparable from his person, which remains his own while he steps into the other's position[3]. This is worked out by Max Huber in the following paragraphs:

"§ 94. Rights which are a mixture of private and public rights perish so far as they are public, in case the successor state does not possess a corresponding institution. If it possesses rules which apply to the case they will in the future govern, as for example in the cases of fiefs, knightly property (*Rittergüter*), guilds with compulsory powers, compulsion to grind at a certain mill, monopolies of sale, rights of patronage, schools, saleable appointments, mintage and postal rights enjoyed by private persons, exemptions from military service, etc.

§ 95. All subjective private rights are maintained in favour of all individuals and corporations, and the personality and property of institutions are secured to them, so far as no rule of the public law of the

[1] Only conquest is mentioned in the dictum, but the commissioners treated the case of cession as undistinguishable. See above, p. 74.

[2] See above, p. 8.

[3] See above, p. 69, and von Bar's remarks on specific securities for public debts, quoted in the note, p. 79.

successor state prevents it. If such a corporation is to be extinguished, the new sovereign must proceed as though it had already existed in his country and he was now legislating for its suppression."

Thus the continued existence of concessions must depend on their not being in conflict with the public law and policy of the annexing state, but if they are cancelled the persons interested will be entitled to such compensation as that state grants on cancelling a concession of its own. This doctrine, which we approve, we understand to be in substantial agreement with the view of the Transvaal Concessions Commissioners.

CHAPTER V.

THE TITLE TO STATE TERRITORY.

Territorial Sovereignty, Property, Eminent Domain.

We have appealed to our common experience for the fact that a state is an ideal body, having on the one hand a certain territory and on the other hand being composed of individual men as its members[1]. We have now to consider a state in each of those relations, and first with reference to its territory. Still taking our stand on common experience, we are taught by it that two different kinds of right are enjoyed over the soil. One is that of property or ownership, through which private persons, and companies or other groups of persons of a private character—that is, for our present purpose, of a character inferior to the state—enjoy certain pieces of land exclusively one of another. Even the state may appear as the owner of landed property, as in the cases of the foreshore, public roads and rivers, arsenals and other public buildings, forests and other tracts of public land; in all which cases the state has a right of property, not distinguishable from that of a private person, in addition to the right which it has over the territory at large. The other right enjoyed over the soil is that which the state has over the territory at large, as well those parts of it which are in private ownership as those which belong to itself as owner. This is a right existing for the purposes of government, and comprises the right to act within the limits of the

[1] Above, p. 3.

territory upon or against all persons found there, and to dispose of the property in all parts of the territory, whether with or without compensation to private owners, as in the judgment of the state the purposes of government may require. Being a right of supreme government, it is usually and properly described as the sovereignty over the territory, to which in English dominion is equivalent though in Latin *dominium* means property.

So far as the territorial sovereignty of a state authorises it to interfere with property it is called eminent domain. An example of the right known by that name is seen in the familiar case of expropriation for public purposes, whether directly for the benefit of the state, as when it is desired to build a fortress, or in favour of private persons although for the general good, as when a railway company is empowered to take land. It would also be exemplified if the owner of the land on the coast were prohibited from using it in such a manner as to facilitate the encroachment of the sea; and other cases might be put. The distinction between eminent domain and the feudal right of escheat, by which the land of a vassal reverted to the lord on the failure of heirs of the particular description pointed out by the tenure, has not always been clearly seen. It has sometimes been thought that the right of escheat in case of a total failure of heirs, which belongs to the English king, of whom all the land of England is immediately or ultimately held, is of the nature of eminent domain, and is somehow helpful in giving the English state its right of appropriation for public purposes. But this is a mistake. Every state has internationally, and probably every state has constitutionally, the right of expropriation for public purposes whether feudal tenure exists in it or not; and a right of escheat, where it exists, is really a part of the property reserved to the lord, like the reversion on a lease. Eminent domain on the other hand is not a part of the property but a right of interfering with property, which it limits.

Another error sometimes committed with regard to eminent domain is supposing that the cession of a province by one state to another is made by virtue of it. In such a case there is no interference with private property by the mere force of the

cession. The ceding state alienates its territorial sovereignty, and the property in those parts of the soil which belong to it as property, but the private proprietors of the province are unaffected, and if the state receiving the cession desires to erect a new fortress or to enlarge an old one, it must acquire the necessary land from the owners by purchase, or by expropriation according to its laws. This is not the less true because a government may sometimes assume the power to cede land to a foreign state in property as well as in sovereignty, taking on itself the burden of expropriating the private owners. In that case there would be an exercise of the right of eminent domain, and if the treaty were made with the approval of the constitutional treaty-making power, the state accepting the cession would not need to enquire further about the constitutional existence of that right in the state making the cession. It is necessary for the intercourse of states that a government should be accepted internationally as representing, not only its state, but its subjects and all rights of whatever kind existing in relation to its territory, and so eminent domain is always an international right, indeed a part of territorial sovereignty[1].

In the middle ages the distinction between sovereignty and property was obscured so far as feudal notions prevailed, the very essence of those notions being to confound in a common haze the right of a lord to rule in his manor and the right of our sovereign lord the king to rule in his kingdom. A trace of this confusion remains in the use of the word dominion, which etymologically means lordship, to express territorial sovereignty; but the distinction was recognised as soon as international law took its place as a definite province of thought. When our subject is discussed in Latin sovereignty is *imperium*,

[1] *Jure civili omnia regis sunt, et tamen illa quorum ad regem pertinet universa possessio in singulos dominos descripta sunt....Ad reges enim potestas omnium pertinet, ad singulos proprietas....Sub optimo rege omnia rex imperio possidet, singuli dominio.* Seneca, *De beneficiis*, l. 7, c. 4–5.

Grotius says—1, 3, 6—*dominium eminens quod civitas habet in cives et res civium ad usum publicum.* But although sovereignty exists *in cives* for the purpose of international representation, the circumstance that *dominium* means property makes it better to restrict eminent domain as a technical term to the *res civium.*

property *dominium*, eminent domain *dominium eminens*; and Grotius writes: *imperium duas solet habere materias sibi subjacentes, primariam personas, quæ materia sola interdum sufficit, ut in exercitu virorum, mulierum, puerorum quærente novas sedes, et secundariam, locum qui territorium dicitur.* In the case which he has thus put, that of an emigrant people founding a new settlement, the sovereignty over the soil on which they established themselves and the property in it would be acquired together; so also would it be where an old state established its authority in a new country; and in the great age of discovery these were the most interesting cases. So Grotius proceeds: *quanquam autem plerumque uno ictu quæri solent imperium et dominium, sunt tamen distincta, ideoque dominium non in cives tantum sed et in extraneos transit, manente penes quem fuit imperio*[1]: property may pass even to foreigners, but the sovereignty of the state over the soil owned by them is not thereby affected. Still, in the minds of less clear thinkers, the fact that sovereignty and property were in new countries acquired together, and as we shall presently see under rules borrowed from property, perpetuated the confusion between them which had arisen from feudal ideas. The right of a state over its territory, instead of being distinguished as sovereignty, including eminent domain as internationally annexed to sovereignty, has been very often described as international property. Attention has been fixed on the two points of resemblance between territorial sovereignty and landed property, their exclusiveness—a state may exclude other states from performing acts of sovereignty in its territory, as an owner may exclude other persons from acting as owners on his land—and their being alienable. So fixed, the attention has been proportionately withdrawn from the cases in which sovereignty and property are alienated or otherwise dealt with independently the one of the other, being the overwhelming majority of the cases in which either is dealt with at all, and from the widely different parts played by them in the system of acts and purposes which makes up civilised life. But now at last the wisdom is widely

[1] *De Jure Belli ac Pacis*, 2, 3, 4. And see the quotation from Seneca on p. 86.

recognised of bringing into full relief the difference between two things which on the whole are rather contrasted than similar[1].

Title to territory: Old and New Countries.

When the owner or claimant of land has to show his title to it he starts from the proved or presumed ownership of some one else at a past date, and deduces his own title from that of the latter person by a series of deeds, wills, and heirships. Or if his own ownership has extended over a length of time greater than that for which the law makes it necessary that title should be shown, he seeks no other root, but adduces acts of ownership done by him during the necessary period. In either case he has nothing to do with the origin of property as a subject of philosophical or prehistorical speculation, or with the usefulness of property as an institution and the desirableness of maintaining it. His investigation starts from property as already existing in as great perfection as that in which he claims it. Just in the same way, in old countries, the title

[1] "Without the historical and juristic aid of the idea of property and its application to the territory of a state, it would not have been possible for the old theorists to discover the principle of political sovereignty": Holtzendorff, vol. 2, p. 228. "The pretended right of property attributed to the sovereign is an error of past times, when states were considered as the patrimony of the prince, and alleged conquest, prescription or inheritance as titles to that pretended right. Now, the old theories which were humiliating to mankind having been eliminated, it is time to modernise our language and to eliminate the term *right of international property* attributed to the sovereign of the state": Pasquale Fiore, *Diritto Internazionale Pubblico*, 3rd edition, § 863, vol. 2, p. 108. "It is to the territorial sovereignty that belongs the exclusive rule in all the extent of its possessions. Placing one's self at that point of view, and considering only the international situation of the state, one may say that it is the owner of its territory. In fact it alone can dispose of it, and it does not admit the interference of other powers. As to the private properties situate within its limits, it exercises with regard to them all public rights, that is to say the supreme right to protect them and dispose of them, but they no way belong to it according to the principles of private law (*dominium*)": F. de Martens, *Traité de Droit International*, translated from Russian into French by Léo, vol. 1, p. 452.

of a state to its territory is not concerned with the origin or vindication of territorial sovereignty as an institution, or with the conditions of its first acquisition in any particular case. The state either pleads its own possession, where there is ground for contending that that gives a sufficient title, or by a series of cessions and successions it deduces its title from a root, found in a right of the same nature as that claimed and acknowledged to have belonged at a past time to some other state. In all this there is no difference between states of our and of different civilisations. We have already remarked that the territories of both are acknowledged to be held by titles of the same kind[1], for in fact there is no such difference between any two forms of civilisation with regard to the ideas connected with sovereignty as there is with regard to the family relations and to the criminal law and its administration. So China or Turkey may rank as well as France or Germany in a question of the title to territory, either as the root from which the title is deduced, as a party to any of the transactions through which it is deduced, or as the state to which it is finally deduced. The difference between old and new countries, to which we have alluded in restricting to the former what we have here said about the title of a state to its territory, does not lie in the direction of the contrast between western and eastern civilisations.

New countries, when we are speaking of the title to territorial sovereignty, are those in which nothing exists that is recognised as a state of international law, nothing therefore which can be quoted as a root of title. There may be tribes with which civilised powers or individuals can make agreements, the conclusion and performance of which must be subject to the universal duty of good faith. But the question for the white settler is whether there is a territory in which the pursuits of civilised life can be carried on, under a sovereign power sufficiently understanding those pursuits and sufficiently organised to be capable of giving them the necessary protection, and of administering justice in the questions arising out of them. Or at least whether there is a sovereign power which can do this

[1] Above, p. 40.

in conjunction with consuls accredited to it and whose authority is normally supported by it, as happens in states like Turkey or China. If there is either the one or the other, the country contains a power with which relations are possible, based not merely on good faith but on the specific principles of international law. If there is not, the country is a new one, states and territories have to be established in it, and the question of title in it will involve what in old countries it does not, the consideration of the origin of territorial sovereignty.

That ever since the discovery of America there have been countries which the Christian powers of Europe have regarded as new in this sense, and that that fact brought with it the necessity of considering title from a new point of view, is matter of history of which no better account can be given than that given by Chief Justice Marshall, in delivering the opinion of the Supreme Court of the United States in the case of *Johnson* v. *Mc Intosh* in 1823:

"The potentates of the old world," he said, "found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilisation and Christianity in exchange for unlimited independence. But as they were all in pursuit of nearly the same object it was necessary, in order to avoid conflicting settlements and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition which they all asserted should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects or by whose authority it was made against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which by others all assented. Those relations which were to exist between the discoverer and the natives were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them. In the establishment of these relations the rights of the original inhabitants were in no instance entirely disregarded, but were necessarily to a considerable extent impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it and to use it according to their own discretion; but their rights to complete sovereignty as independent nations were necessarily diminished, and their power to dispose of the soil at their own will to whomsoever they pleased

was denied by the original fundamental principle that discovery gave exclusive title to those who made it[1]."

What is said in the above extract about the title by discovery will be developed later; for the present we will pass from the earliest to the latest practice, as equally proving that in new countries the question of the origin of territorial sovereignty is raised, and must be answered on principles agreed on by the civilised states which claim that sovereignty. When the African Conference of Berlin was laying down the conditions for the appropriation by the signatory powers of territory on the coasts of that continent, Mr Kasson, the plenipotentiary of the United States, declared that "his government would gladly adhere to a more extended rule, to be based on a principle which should aim at the voluntary consent of the natives whose country is taken possession of, in all cases where they had not provoked the aggression[2]." The conference took no action on this invitation, and in answer to another desire expressed by Mr Kasson—that since an occupation might be rendered effective by unjust acts of violence, it should be reserved for the respective signatory powers to determine the conditions of an occupation from the point of view of right as well as of fact before recognising it as valid—it was merely recorded that, in the unanimous opinion of the conference, its Act "did not limit the right which the powers possessed of causing the recognition of the occupations which might be notified to them to be preceded by such an examination as they might consider necessary[3]." It can scarcely be doubted that in this the conference acted as best suited the interests of the natives. Whether the ideas of a tribe permit soil occupied or claimed by them to be ceded, and by what tribal authorities the cession ought to be made if permitted at all, are usually obscure questions. So also are the questions whether a proposed cession has been fully explained to the tribe and fair value given for it, and on which side lay the blame of aggression in the conflicts there may have been between the

[1] 8 Wheaton's Supreme Court Reports (21 U.S.), pp. 573, 574.

[2] Protocol of 31 January 1885: Parliamentary Paper c. 4361, p. 209.

[3] See the remarks of Herr Busch, the German Under-Secretary of State for Foreign Affairs, who was presiding. *Ibid.*

natives and the new comers. These are excellent materials for criticising an acquisition made by a rival power, and to introduce them normally into the title of civilised states to regions in new countries would have a tendency to provoke contests from which the natives would be the greatest sufferers. Extreme cases of injustice to indigenous races are provided for by the right of the civilised powers, which we have seen was recognised, to examine the source of occupations notified to them when deemed necessary. But in ordinary cases it must be remembered that as soon as attention has been drawn to any new part of the world white men will flock into it for trade, for agricultural or pastoral settlement, or for mines—that the natives themselves can be protected against the license of immigrants only by the establishment over them of a white government, alone capable of ensuring obedience—and that the ignorant and helpless natives are the more likely to receive the consideration due to them from a white government, the freer is the position of the latter from insecurity and vexation by rivals.

Prescription.

The cessions and successions, by which in old countries the title to territorial sovereignty is deduced from an assumed root of the same nature as the sovereignty to be shown, may be discussed under their respective heads, as those of treaties and conquest, but nothing general can be said about them. On the other hand the question of prescription as an admissible element of international title requires notice. We do not here refer to immemorial possession in the true sense of that term, that is a possession than which no earlier state of things is known, for in that case the possibility of an adverse title is excluded, seeing that such a title if it existed would have to be founded on an earlier state of things. We refer to the rules which in the law of a given country fix a certain lapse of time either for acquisitive prescription or usucapion, that is for transmuting possession acquired in good faith into property, or for prescription properly so called, that is for barring claims against a possessor. And the question arises whether any similar rules exist between

states with relation to territorial sovereignty. It may be said at once that there has never been any international agreement, either express or tacit, by which such a lapse of time has been fixed; but on the other hand it has seldom been doubted that the disturbance of long possession by stale claims would be more noxious between states than between private persons, on account of the want of a judicature supported by organised force, and that therefore time must be admitted as having in international right a true though undefined operation. Hence the existence of prescription in international law has been denied or asserted, as the particular author has been more impressed by the difficulty of calling any rule a law which is wanting in exact definition, or by the difficulty of refusing the name of law to a principle constantly acted on with general approval. The principle was based by Grotius and Vattel, as by most writers on natural law, on the presumed abandonment by the former sovereign or owner of a claim with regard to which he has not given due warning of his intention to keep it alive. Both however appear to have felt that the peace of the world would not be sufficiently protected by a presumption which, whenever the occasion arises for urging it, is encountered by the fact that the claim presumed to have been abandoned is actually made—which, even in theory, would allow a claim to be kept alive indefinitely by mere protest—and which at best would allow excuses, not easily appreciable at their true value, to be put forward for not having effectively made the claim earlier. Grotius seems to lean towards a time limit of, speaking roughly, a century, as being that of the memory of one generation and of the activity of three generations[1]. But this suggestion has not been followed. Vattel required a very long possession, neither interrupted nor contested, and the context may indicate that by the latter term he meant something more than not protested against[2]. If so, he seems to have carried the matter as far as it is possible to carry it.

For the rest, such a doctrine of prescription as is possible in international law has no room for application in a part of the

[1] *De Jure Belli ac Pacis*, 2, 4, 7.

[2] *Le droit des Gens*, liv, 2, § 149.

world like modern Europe, in which the state of possession is always regulated by treaty or by the juridical effect of conquest. But we shall see later that there is room for it in new countries, where it has often been questioned whether the abandonment of a right never matured by effective occupation must not be conclusively presumed, and even whether the abandonment of effective occupations, from which the states which have made them have afterwards practically withdrawn, must not be presumed. The connection which we shall see that the question of title in new countries had with the theory of possession in Roman law makes it important to remark that in that law the intention to give up possession might be inferred from mere negligence[1].

Papal Grants: Title by Discovery.

At the commencement of the great age of African and American discovery the popes still claimed to be masters of the world by divine right, and especially of all islands by the forged donation of Constantine. By a bull of 1454 Nicholas V granted to King Alfonso V of Portugal the discoveries made and to be made on the west coast of Africa, and by one of 4 May 1493 Alexander VI granted to Ferdinand and Isabella, and to their successors kings of Castile and Leon, all land further west than a line drawn from north to south a hundred leagues west of the Azores of which no Christian power had taken possession before Christmas Day 1492, the lands to the east of that line to belong to Portugal. By another bull of 25 September in the same year the pope, superseding that arrangement, opened the entire field

[1] Savigny on *Possession*, pp. 270–2 of the English translation. Note however the teaching of Savigny that a physical relation to the thing claimed to be possessed, which would not have sufficed to establish that possession of it had been in fact acquired, may be sufficient for retaining a possession once acquired, since the continuance of possession depends on the constant power to reproduce the physical relation at will: *ib.* p. 171. Thus the Portuguese title to the southern coast of Delagoa Bay, which was within easy reach of the permanent Portuguese settlement on the same bay, was adjudged by Marshal Macmahon as arbitrator to have been kept alive by intermittent acts of sovereignty, notwithstanding that the natives professed to be independent and acted as such at the time of the British occupation in 1823: see Hall, § 34, p. 122.

of oceanic enterprise to both nations, the Spaniards however to sail only westward and not infringe the African monopoly of the Portuguese[1]. But in 1494 the sovereigns of Spain and Portugal, by the treaty of Tordesillas, fixed their mutual limit at a line drawn 370 leagues west of the Cape Verde Islands, and in 1506 pope Julius II confirmed that treaty. It is superfluous to remark that as soon as Protestant states arose such papal grants could not be pleaded against them: even at the time when the grants were made Catholic powers were far from admitting as conclusive authority the power which they thought it best to conciliate for what it was worth. Ferdinand and Isabella, in the petition to which the bull of May 1493 was a response, put on record that learned jurisconsults were of opinion that no confirmation of their rights was necessary, and that they addressed themselves to the pope only in order to give proof of their deference and obedience to him[2]. Henry VII of England, in the letters patent which he granted to John Cabot and his sons on 5 May 1496, empowered his grantees to navigate the eastern, western and northern seas, and "to find, discover and search out all islands, countries, regions and provinces of gentiles and infidels, situate in any part of the world, which were unknown to all Christians before these times." They were to set up the royal standard there and to hold their conquests as vassals and lieutenants of the king, who reserved to himself only the sovereignty and a fifth of the profit[3]. Thus he disregarded the bulls, though respecting the prior rights which the Spaniards had acquired in the southern seas by their own activity. Francis I acted with equal independence, claiming under the name of New France the coast from Florida to an indefinite distance northward; and there was thus on all sides a reference to some purely secular mode of the original acquisition of sovereignty in new countries. This was the title by discovery, which at first all agreed in vaguely proclaiming, but about which, as soon as the development of events made it necessary to give it a precise form, differences arose with regard to the

[1] E. J. Payne, in the *Cambridge Modern History,* vol. 1, p. 23.

[2] Nys, *Les Origines du Droit International,* p. 371.

[3] Nys, u.s., p. 368; quoting Rymer's *Foedera,* vol. 5, part 4, p. 89.

necessity of completing it by effective occupation. Such as it was, the ideas of the age required it to be found in Roman law, by which, as being "written reason" and therefore of universal obligation, the princes between whom the disputes arose were bound as well as private individuals. And it had to be found especially in that part of Roman law which the Roman jurists had described as the law of nature, because princes over whom there was no superior lived in a state of nature as towards one another[1]. It will therefore be well to give in the first place an account of the relevant Roman law, both as it was and as in the erroneous conception then prevalent it was thought to be, in order that the reader may understand the mental atmosphere in which the disputes about the relative importance of discovery and effective occupation were carried on.

The Roman Law of Occupation and Possession.

The Roman law invoked was in the last analysis that which declared occupation to be the natural mode of acquiring property in *res nullius*, things in no one's ownership: *quod nullius est, id ratione naturali occupanti conceditur*[2]. This was necessarily a law on the acquisition of property and not on that of sovereignty: the sovereignty of Rome is assumed in the *Corpus Juris*, as that of every state is assumed in its own legislation. That however did not matter, for since it was agreed that the heathen savages were of no account it followed that in the countries inhabited by them sovereignty and property were to be acquired by the Christian princes together, and the property to be enjoyed by Christian settlers would be carved by the grant of their sovereign out of that which belonged to him as the first occupant[3]. A greater difficulty lay in this, that as the soil of the empire was already parcelled out among proprietors, including the state for those parcels of which it had the property as well as the

[1] *Jus etiam illis perscriptum libris Justiniani non civitatis est tantum sed et gentium et naturæ....Ergo et principibus stat, etsi est privatis conditum a Justiniano:* Albericus Gentilis *de Jure Belli*, l. 1, c. 3; Holland's edition, p. 16.

[2] Gaius, in Dig. 41. 1, 3.

[3] See the quotation from Grotius on p. 87.

sovereignty, the Roman lawyers scarcely thought of anything except movables as the subject of acquisition by occupation[1], and the occupation of a movable does not give occasion for those questions, which proved to be so thorny, relating to the geographical extent to which the legal consequences of what is done at a particular point may reach. The gap thus left might however be filled by reference to the theory of possession, which, as a right distinct from that of property, was the subject of careful protection by Roman law in the case of immovables as well as in that of movables. Occupation might be regarded as a *naturalis possessio*, on which the right of property followed because, in the case of what had been a *res nullius* until the first possessor set foot on it, there could be no better title than that of the first possessor to oppose to him. Indeed this had been observed by the Romans themselves: *dominium rerum ex naturali possessione cœpisse Nerva filius ait*[2]. And so it was practically the Roman rules on possession, or what were believed to be such, that were held to govern the case of discovery.

Now the theory of possession was that it required both a bodily act and a mental attitude: *apiscimur possessionem corpore et animo, neque per se animo aut per se corpore*[3]. The necessary bodily act was prehension; such a seizure as to give the mastery over the thing, including the power of retaining it, without which there would not be mastery: *non videtur possessionem adeptus is qui ita nactus est ut eam retinere non possit*[4]. This, where the possession of an immovable is peaceably transferred to a purchaser or donee, does not always require that he or his agent shall perambulate every part of it. If the intention of the parties refers to a known unit of moderate size, as a farm or a house, and there is no obstacle to that intention being carried into effect at any moment by the party let into possession, the

[1] It is true that among the things capable of occupation Paulus mentions an island arising in the sea: Dig. 41, 2, 1. But this is an exception which proves the rule.

[2] Thus Paulus, in Dig. 41, 2, 1. The reader will do well to note that this title of the Digest is headed *de adquirenda vel amittenda possessione*, the previous title (41, 1) being *de adquirendo rerum dominio.*

[3] Paulus, in Dig. 41, 2, 3.

[4] Javolenus, in Dig. 41, 2, 22.

transfer may take place at one point with effect as to the whole[1]. But if the unit, although known, is so large that a physical power of dealing with the whole and excluding others from it cannot be contemplated as resulting to the transferee from the act of induction, as if the intention is to transfer the possession of a great estate but the induction takes place at only one of the farms composing it, then it was never held either in Roman or in feudal law that livery of seisin of that farm could be livery of seisin of the whole estate[2]. Still less if possible, where a discoverer enters on land regarded as a *res nullius*, a supposition which negatives the possibility that the unit on which he enters can be ascertained by a concert of intention between him and the previous possessor, would the Roman theory extend the possession acquired by him beyond the limits which he can control from the position which he actually takes up.

The mental attitude required by the Roman theory for the acquisition of possession was the intention to possess. Applied by analogy to the acquisition of property by occupation, it is the intention of ownership, the *animus rem sibi habendi*. On this however a misunderstanding existed in the age of the renaissance and long afterwards, indeed until it was finally dispelled by Savigny[3]. It was thought that the *animus* included

[1] *Quod autem diximus, et corpore et animo adquirere nos debere possessionem, non utique ita accipiendum est ut qui fundum possidere velit omnes glebas circumambulet, sed sufficit quamlibet partem ejus fundi introire, dum mente et cogitatione hac sit uti totum fundum usque ad terminum velit possidere:* Paulus, in Dig. 41, 2, 3.

[2] Savigny on *Possession*, book 2, section 19; pp. 173–4 of the English translation.

[3] Savigny held that the *animus* required for possession was the intention of ownership, for which modern jurists commonly use the term *animus domini*, not found in the ancient texts. Jhering held it to be only the intention of keeping the thing, but Karlowa makes it to be the intention of possessing, which he distinguishes from the intention of keeping by its including the will to deal with the substance of the thing, at least in certain eventualities, and not merely to use it without affecting its substance. Thus the later authorities, while distinguishing the *animus* necessary for possession from that of ownership, which must certainly be present in occupation, agree with Savigny in referring the *animus* in all cases to the nature of the right or position intended to be acquired, and not to its extent in space. The work of Savigny, in dispelling the notion that

the intention of the acquirer as directed to a larger or smaller extent of space, so as to govern the operation of the possession taken at a given point. This was not only without warrant from the texts; it conflicted with them with regard both to occupation and the corporal element of possession. Considered with regard to the rules about possession, it set aside the necessity that the acquirer should have the physical mastery of the thing to be possessed, or at least that such mastery should be capable of being contemplated as the immediate consequence of his acquisition. Considered with regard to the natural acquisition of property, it substituted for a real occupation a symbolical occupation of a province or of a continent, effected at a certain point, and being in the last analysis nothing more as to all other points than an intention to occupy at some future time.

Titles by Discovery and by Effective Occupation.

We are now in a position to appreciate the title by discovery put forward at the opening of the great age of discovery. First, it was not imagined that any title could be gained by a discovery made by subjects without authority from their governments. The title, though for shortness it might be spoken of as one by discovery, was always understood to be one by discovery and occupation, and occupation, with the consequent acquisition of dominion, could in the nature of things be only the act of a state. But if a private uncommissioned discoverer professed to acquire for his state, a ratification by it before another power had stepped in would be in time[1]. These principles occasioned little or no difficulty in the fifteenth and sixteenth centuries, when explorers, even though not belonging to the regular service of their countries, were usually furnished with letters

it could be of the latter character, with the consequence of an act having legal effect for an area with a view to which it is symbolically performed at a point, does not seem to have been attacked by his critics.

[1] *Possessionem adquirimus et animo et corpore, animo utique nostro, corpore vel nostro vel alieno:* Paulus, *Sententiarum* lib. 5, tit. 2. The principle that *omnis ratihabitio retrotrahitur et mandato aequiparatur* carries the *animus noster* back to the *corpus alienum*.

patent or some other authority *ad hoc.* But the United States in the Oregon dispute with Great Britain ran counter to them in founding their claim on the discovery of the mouth of the Columbia River by a private adventurer, Captain Gray, followed by an establishment which one of their citizens, Mr Astor, made on that river, although up to the time when Astoria was sold to the British Northwest Company their government had not adopted the discovery, and had returned no answer to the letter by which Mr Astor had requested it to authorise his proceedings. The British negotiators did not admit the claim, and the region was divided by the treaty of 1846. There is however no serious doubt about the principles. On the one hand a government will gain no title from the discoveries made even by its own expedition, sent out with no other avowed object than that of scientific research[1]; and on the other hand the advance of European states in Africa is usually made at the present day by following, and so far as sovereignty is concerned adopting, the establishments made by their subjects beyond their frontiers.

Secondly, besides the requirement of state authority there was that of publicity. "In newly discovered countries," Lord Stowell said, "where a title is meant to be established for the first time, some act of possession is usually done and proclaimed as a notification of the fact[2]." Notification is here to be understood in the general sense of making known, and not in the special sense of an express communication to other powers in which it is used in the general act of the African Conference

[1] 2 Holtzendorff, pp. 258–9; where the learned author says that "even the sending of missionaries to convert the natives, on which the Spanish government founded in the controversy about the Caroline Islands, can no longer be considered as an act of occupation, because it was the church that sent them." "The discoverer must either in the first instance be fortified by the public authority and by a commission from the state of which he is a member, or his discovery must be subsequently adopted by that state:" Phillimore, *International Law*, vol. 1, § 227. "*Il est nécessaire que l'occupation ait lieu au nom et avec l'assentiment d'un gouvernement...L'occupation entreprise par des particuliers doit être sanctionnée par le gouvernement au profit duquel elle a été accomplie:*" F. de Martens, French translation, vol. 1, p. 463.

[2] In *The Fama*, 5 C. Robinson 115.

of Berlin. If the discovery was made in a spirit of occupation and by an authority competent for that end, the facts would soon be known through the reports of the voyage which ran round the world. If it was made by private and unauthorised mariners, its adoption by their government would generally be accompanied by some public act like the erection of a fort. But whatever the means by which publicity was effected, it was never thought that either discovery or appropriation could be kept secret and the benefit of it retained.

These two points being premised, which it would be unfair to suppose were not assumed even where discovery alone was mentioned, we come to the points of divergence. The Spaniards —possibly only because they were the first comers in America— carried extremely far the claim to have occupied vast tracts of territory by the representative effect of acts done at certain points[1]. No geographical conception seemed to them too large to be embraced as a unit by the *animus* of an occupant. Thus Venezuela, maintaining old Spanish pretensions in the arbitration between her and England in 1899, put forward the whole of Guiana, bounded by the Orinoco, the Casiquiare, the Amazons and the sea, as a unit to every part of which the effect of occupation at any point of it extended. And this exaggeration of the scope of the mental attitude entering into occupation at the expense of the corporal act led, naturally, to reducing the latter to a merely ceremonial one. To read a proclamation, plant a flag, perhaps make some mark on a rock, and sail away without building a fort or leaving any other embodiment of power, was represented as taking possession. Such claims the English and other later comers on the scene could not and did not admit. It is true that behind the pretensions there lay a kernel of substance, but it was of a political and not a legal character. Where the king of Spain or any other sovereign built a fort or founded a settlement, the legal doctrine would measure his right in space by the area which the force existing there would enable him to rule from it. Within that range alone could his occupa-

[1] The view is expressed by Pufendorff, though with more moderation. *Occupatio rerum soli*, he says, takes place *pedibus, cum intentione culturam iisdem adhibendi, ac constitutis limitibus vel exacte vel cum aliqua latitudine:* 4, 6, 8.

tion be strictly called real or effective. But a fort or a settlement may not only be a seat of actual rule but a centre for the extension of that rule; and while the sovereign cannot fairly by delaying such extension exclude the rest of the world for an indefinite time, it would be an unfriendly act for another to step in prematurely and cut off his reasonable hopes. Thus, since sound politics cannot be ignored in international law, arose the doctrine that in new countries civilised states only gain conclusive title by effective occupation, but yet that a moderate time must be allowed for the extension of such occupation over a reasonable area round the point at which it has been commenced. This is the doctrine of effective occupation, and has usually been contrasted as such with that of title by discovery. Moderate and reasonable are loose terms, as must be expected where politics mingle with law in the construction of a theory, but the theory has in its favour the great weight of authority, and is fully stated by Vattel, who says:

"Thus navigators, being on voyages of discovery with commissions from their sovereigns and meeting with islands or other desert countries, have taken possession of them in the names of their nations; and that title has generally been respected if it has been closely followed by a real possession[1]."

The same view was stated by Queen Elizabeth, with as much fulness as was required by the occasion, in her reply to Mendoza, Philip II's ambassador, who complained of the expedition of Drake.

"As," she said, "she did not acknowledge the Spaniards to have any title by donation of the bishop of Rome, so she knew no right they had to any places other than those they were in actual possession of; for that their having touched only here and there upon a coast, and given names to a few rivers or capes, were such insignificant things as could in no ways entitle them to a propriety further than in the parts where they actually settled and continued to inhabit[2]."

Nor does the position ultimately taken by Spain herself appear to have been very different. In the declaration of

[1] *Droit des Gens*, 54, 1, § 207.

[2] Camden's *Annals*, year 1580. Translated as in Twiss, *Oregon Question*, p. 161.

4th June 1790 signed by the Count de Florida Blanca and sent to all the courts of Europe during the Nootka Sound controversy, the king of Spain limited his claim in the Pacific to "the continent, islands and seas which belong to His Majesty, so far as discoveries have been made and secured to him by treaties and immemorial possession, and uniformly acquiesced in, notwithstanding some infringements by individuals who have been punished upon knowledge of their offences[1]."

It will be noticed that in stating the doctrine of effective occupation we have described it as being the only means of gaining a conclusive title. It was intended by this to leave open the question whether any steps taken short of effective occupation confer only an inchoate title, to be completed by effective occupation within a reasonable time, or may confer a full title, to be lost by presumptive abandonment if effective occupation does not follow within a reasonable time. The latter mode of statement has been the most usual on the continent, and falls in both with the old notion that title could be acquired by an intention directed to an area, and with the habit of assuming abandonment, real or presumptive, as the ground for any admission of prescription in international law[2]. Hence writers who seem to admit the title by discovery in the ancient Spanish sense must not be reckoned as practically hostile to the doctrine of effective occupation, until it is seen whether they do not reach its goal through the theory of abandonment. The other mode of statement, with the term "inchoate title" which is necessarily connected with it, has been much used by English writers, and agrees best both with Roman law as now understood, and with the discouragement of stale claims in the interest of peace which is the substantial reason for the admission in international law of some equivalent to the prescription of national laws[3].

[1] Twiss, *Oregon Question*, pp. 109, 163. The treaty meant was that of Utrecht, the terms of which were too general to support the particular Spanish claim to Nootka Sound, and the exact meaning of the declaration might be open to discussion if it was worth while.

[2] See above, p. 93.

[3] Perhaps prescription in international law, whether grounded on constructive abandonment or otherwise, was never more broadly denied,

Modern Views: Arts. 34 and 35 of Berlin.

The peoples of European blood made during the nineteenth century, and especially during the second half of it, an advance in their knowledge of the globe comparable to that which they made during the fifteenth and sixteenth centuries, but the earlier period was the age of discovery, the later that of exploration.

or the denial accompanied by a more rigorous specific application, than by the United States of America during their disputes with Spain as to the boundary between Louisiana and Mexico on the coast of the Gulf, and with England as to their northwestern boundary. Their negotiators—Pinckney and Monroe on 20 April 1805 and J. Q. Adams on 12 March 1820—laid down three principles, the first and second of which embodied the doctrines of watershed and middle distance, and the third was thus expressed: "That whenever any European nation has thus acquired a right to any portion of territory on that [the American] continent, that right can never be diminished or affected by any other power, by virtue of purchases made, by grants, or conquests of the natives within the limits described." The case on the Gulf was this. La Salle, sent out by the French government to make a permanent settlement, built a fort in 1685 in a bay called by him that of St Louis, now known as the bay either of Espiritù Santo or of Matagorda: it is not certain which, and it is immaterial, they are so near one another. The Indians massacred the garrison in 1689, and the French made no attempt to recover the spot. In 1690 the Spaniards founded a settlement in Espiritù Bay, and from that point eastward to the delta of the Mississippi there was on the coast no settlement of either nation, and in the interior the most advanced Spanish and French posts were respectively at Adaes and Natchitoches, nearer to the Mississippi than to Espiritù Bay, until Spain got possession of Louisiana in 1769, under the cession which France had agreed to make in 1762. After certain intermediate transactions Louisiana was transferred to the United States in 1803, and they then claimed that France had never lost the sovereignty of the spot where La Salle had built his post; that that fort gave to France the coast as far west as the Rio Grande, being the middle distance to the then nearest Spanish settlement on that side; that the subsequent Spanish settlements, which by 1803 reached in a compact line to Espiritù Bay, were unlawful encroachments; and that the Rio Grande was therefore the true boundary between the United States and Spain. But the treaty of 1819 between the two powers fixed their boundary at the river Sabine, nearly where the line between the French and Spanish posts had been before 1769. See Twiss's *Oregon Question examined.*

Coast lines were sighted and mapped in the one, the interiors of continents have been laid bare in the other. The former process detects the unknown, the latter brings the vague into clearness. The processes differ in their effects bearing on international law. The mouth of a river is a point to be fortified, and geographical conceptions cluster round it; the route of a traveller leaves no more mark than the track of a ship, and one cattle or sheep farm is very like another as the possible centre of a district. Hence exploration lends itself less easily than discovery to those legal ideas which connected sovereignty with occupation in the Roman or what was believed to be the Roman sense. On the other hand, as the settler is not long in following the explorer even if he is not himself the explorer, exploration is in closer contact with the political ideas which arise on the presence of white men in the midst of native tribes. That civilised states should assume sovereignty over new but not uninhabited countries, on a system which they arrange among themselves without reference to the natives, can only be justified by the necessity of a government where whites and natives meet, and by the inability of the latter to supply a government adequate to the white men's needs or to their own protection. Accordingly the modern tendency of thought is to place the original acquisition of title to sovereignty squarely on this basis, and so to furnish the doctrine of effective occupation with a new and solid support. "No state," says Holtzendorff, "can appropriate more territory through an act of occupation than it can regularly govern in time of peace with its effective means on the spot[1]."

The rules which the African Conference of Berlin laid down in Articles 34 and 35 of its General Act, though limited in their expression to the acquisition of territory on the coast of Africa, embody the shape which the law as to the original acquisition of title has taken under the influence of these views. Few doubt that their principles are applicable generally, and indeed Sir Edward Malet, the British representative, expressed at the conference the desire that they should be declared for the whole of the African continent, but it was thought more con-

[1] *Handbuch des Völkerrechts,* vol. 2, p. 263.

venient on that occasion to declare them only for the limits mentioned. They are as follows:

"Art. 34. Any power which henceforth takes possession of a tract of land on the coasts of the African continent outside of its present possessions, or which being hitherto without such possessions shall acquire them, as well as a power which assumes a protectorate there, shall accompany the respective act with a notification thereof addressed to the other signatory powers of the present act, in order to enable them if need be to make good any claims of their own.

"Art. 35. The signatory powers of the present act recognise the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African continent, sufficient to protect existing rights and, as the case may be, freedom of trade and of transit under the conditions agreed upon."

The first of these articles refers, among other protectorates, to the colonial ones which have been mentioned above[1] and will be treated more fully in the next chapter. Postponing their consideration, we observe that the article substitutes an express notification for the less precise requirement of publicity to which we have seen that new acquisitions were always subject. And by declaring that the object is to enable adverse claims to be made good it does more, for unless the area over which the new claim extends is in some degree specified it cannot be known what other claims are adverse to it. Accordingly the commission at Berlin which reported on the draft articles which, as amended, became Arts. 34 and 35, although it did not accept Sir Edward Malet's proposal that the notification should always contain an approximate determination of the limits of the territory occupied or protected, yet placed on record that "it remained understood that the notification was inseparable from a certain determination of limits, and that the powers interested could always demand such supplementary information as might appear to them indispensable for the protection of their rights and interests[2]." Thus the difficult geographical questions about the extent to be attributed to an occupation are swept away as to boundaries on the coast and much reduced in importance as to inland regions, where however, since landmarks are less easy

[1] p. 24.

[2] Annex 1 to Protocol no. 8.

to find, some difficulty may still occasionally remain even where the occupation of the interior depends on that of the coast.

The second of the above articles requires the establishment of an authority which may protect the natives with whom contact has become inevitable, and under which the civil rights essential to European or American life may be enjoyed in tranquillity. The "existing rights" mentioned cannot include less than this. Because a native tribe is unable to supply a government suited to white men, and therefore cannot be credited with sovereignty, it does not follow that it is not to be credited with rights of a simpler kind. Property is within the range of native intelligence, and at the moment when white sovereignty is acquired property may be held by natives or by whites to whom they have transferred it with full knowledge of what they were doing, or whites may have acquired it in uninhabited places by enterprise and industry of the fruits of which it would be an outrage for any government established later to deprive them. All such rights would be "existing" within the meaning of Art. 35, and the area which they covered would have to be excluded from that in which, using the expression of Grotius[1], sovereignty and property are acquired at one blow. The requirement that the authority to be established shall be "sufficient to protect, as the case may be, freedom of trade and of transit under the conditions agreed upon," refers to the special stipulations made by the conference for the Congo Basin, but appears to be sufficient to include any further stipulations to which a given power may have consented in any case. The nature of the functions to be performed in this respect is an additional indication that nothing less than a regular government was contemplated as the contribution to be made

[1] For Grotius, see above, p. 87. The first draft of Art. 35 mentioned private acquired rights, on which the commission observed: *Quels sont les droits acquis qu'il faut faire respecter? Le comité a proposé de placer le mot 'privés' entre ces termes. D'après son interprétation, il s'agit de droits civils, et ceux-ci doivent être sauvegardés à quelque époque qu'ils aient été acquis, avant comme après l'occupation. La commission, en approuvant le commentaire, n'a pas considéré l'intercalation comme indispensable pour déterminer le sens de la disposition.* Annex 1 to Protocol no. 8.

by a state to the general interest, in return for the permission to appropriate dominion to itself.

Such being the obligations attaching to occupation, the sufficiency of the occupation must be measured by their fulfilment. If a state claiming sovereignty by occupation should fail to establish the necessary authority, no other state can be bound to overlook the injury which may be thereby caused to its own subjects being in the country or afterwards entering it, or the inhumanity to the natives which must inevitably result. But exploration commonly begins through private enterprise, sooner or later recognised and supported by the state to which the adventurers belong, so that the development of public authority in the occupied region can only be gradual, and there will usually be an interval during which the fulfilment of the conditions for the acquisition of sovereignty will be more or less in suspense[1]. In short, the doctrine of effective occupation cannot be presented in any form without raising the question which we, in common with most English writers, think is best answered by the doctrine of inchoate title. The ripening of an inchoate title into a complete one, in other words the more or less gradual steps to be taken in fulfilment of the obligation measured by Art. 35 of Berlin, will always call for wise discretion. As we have said elsewhere, "we should certainly be going too far if we said that authority must always be present when its action is required. Even in old countries the means of restoring order and punishing its breach are by no means always ready on the spot where a crime has been committed or a right has been violated, and the rights conferred by an inchoate title would be reduced to very small proportions if other states were allowed to enter the region and set up their

[1] Baron Lambermont said at Berlin that *l'occupation ne saurait être vraiment effective au moment même de la prise de possession : elle ne le deviendra que plus tard, par l'accomplissement de conditions qui impliquent une idée de continuité et de permanence. On ne peut donc rien reconnaître ni contester à cet égard au lendemain de la notification.* Accordingly the commission struck out from the draft of Art. 34 words which would have made it the object of the notification that the signatory powers should be enabled *either to recognise the occupation as effective or* to make good any claims of their own. *Ib.*

own sovereignty at every point where their traders may have suffered a momentary injury[1]. Common sense points out that much must depend on the nature and rapidity of the stream of emigration or of enterprise which is directed to the region. The crowds which flock to new gold-diggings must be speedily provided with a government if it is wished to maintain the pretension to the sovereignty of the country. Pastoral settlements scattered over a vast area may be followed more slowly by a regular administration. What is above all necessary both for the theorist and the statesman is to bear well in mind that no title can prevail against the substantial non-fulfilment of the duties attached to it, not even if the notification required by the Conference of Berlin has been made and has not met with any objection from the powers which have received it[2]." Dr Geffersen said in 1888:

"It is a very doubtful question whether the Congo State can rightfully claim the sovereignty over a territory of more than 2,000,000 square kilometres with 40,000,000 inhabitants, extending in part over regions entirely unexplored and certainly not yet reduced into possession, even though its right to those limits has been acknowledged by other states. These regions will only become the territory of the Congo State in proportion as they are occupied by it[3]."

This seems to us to have been a sound opinion.

It is worth while noting the following testimonies rendered to the necessity of effective occupation by important writers not later than the middle of the nineteenth century.

[1] *Dans des contrées occupées parfois depuis peu et souvent lointaines, la paix peut se trouver exposée à des vicissitudes que l'autorité ne saurait toujours conjurer. Des troubles qui ne seraient pas réprimés sur l'heure, autoriseraient-ils des tiers à mettre les droits de l'occupant en question? Une garantie suffisante réside dans l'obligation de faire respecter les droits acquis, qui comprennent les personnes et les choses.* Baron Lambermont, *ib.*

[2] *Chapters on the Principles of International Law,* p. 165.

[3] Heffter's *Europäisches Völkerrecht der Gegenwart,* 8th ed. by Geffcken, p. 159.

GROTIUS. "Quin et ipsa naturalis ratio, et legum diserta verba et eruditiorum interpretatio, manifeste ostendit ad titulum domini parandum eam demum sufficere inventionem quae cum possessione conjuncta est, ubi scilicet res mobiles apprehenduntur aut immobiles terminis atque custodia sepiuntur, quod in hac specie dici nullo modo potest, nam praesidia illic Lusitani nulla habent." *Mare Liberum*, c. 2.

BYNKERSHOEK. "Ultra detentionem corporalem dominium non extendi nisi ex conventione.....solam legem civitatis dominia rerum defendere etiam sine possessione corporali." *De Dominio Maris*, c. 1, *conspectus*. This view having been attacked by Thomasius and others, he explains in his *Opera omnia* that "praeter animum possessionem desidero, sed qualemcunque, quae probet me nec corpore desiisse possidere."

VATTEL. See the quotation on p. 102, above.

GÜNTHER. "Um das eigenthum dergleichen länder, es sei auf welche art es wolle, zu erlangen, ist es nicht hinlänglich sie entdeckt zu haben oder blos die absicht der bemächtigung an den tag zu legen. Sie müssen auf vorerwähnte weise im besitz genommen werden." *Völkerrecht in Friedenszeiten*, 1792, v. 2, p. 11.

KLÜBER. "L'occupation d'une partie inhabitée et sans maître du globe de la terre ne peut donc s'étendre que sur les territoires dont la prise de possession effective, dans l'intention de s'attribuer la propriété, est constante." *Droit des Gens modernes de l'Europe*, 1819, § 126.

WHEATON. "The exclusive right of every independent state to its territory and other property is founded upon the title originally acquired by occupancy, conquest or cession, and subsequently confirmed by the presumption arising from the lapse of time, or by treaties and other compacts with foreign states." *Elements of International Law*, 1836, § 161. In § 165 Wheaton contrasts the title derived in Europe from conquest and confirmed by long possession and international compacts, with the claim derived in America from discovery, conquest or colonisation, and since confirmed by compact. Evidently he did not put discovery alone as high as a title.

ORTOLAN, Eugène. "Une prise de possession nominale, un signe ou un indice quelconque de souveraineté, ne suffisent pas....Il faut joindre à l'intention...une possession effective, c'est-à-dire qu'il faut avoir le pays à sa disposition et y avoir fait des travaux qui constituent un établissement." *Des Moyens d'acquérir le Domaine International*, 1851, § 73.

The present state of opinion on the subject might be proved from numerous writers of recognised value, but may be summed up by quoting the declaration adopted by the Institute of International Law at Lausanne in 1888.

Projet de Déclaration Internationale relative aux Occupations de Territoires. Art. 1. L'occupation d'un territoire à titre de souveraineté ne pourra être reconnue comme effective que si elle réunit les conditions suivantes.

1°. La prise de possession d'un territoire enfermé dans certaines limites, faite au nom du gouvernement ;

2°. La notification officielle de la prise de possession.

La prise de possession s'accomplit par l'établissement d'un pouvoir local responsable, pourvu de moyens suffisants pour maintenir l'ordre et pour assurer l'exercice régulier de son autorité dans les limites du territoire occupé. Ces moyens pourront être empruntés à des institutions existantes dans le pays occupé.

La notification de la prise de possession se fait soit par la publication dans la forme qui dans chaque état est en usage pour la notification des actes officielles, soit par la voie diplomatique. Elle contiendra la détermination approximative des limites du territoire occupé. *Annuaire de l'Institut de Droit International*, v. 10, p. 201 ; *Tableau Général de l'I. de D. I.*, p. 145.

Subsidiary arguments of Title: Watershed, Middle Distance, Back Country, Political Considerations.

We come now to a class of considerations occupying a prominent place among those appealed to in the historical controversies about the title to territory in new countries, the connection of which with those we have already studied must be explained generically before we enter on any of them in particular. When discovery and occupation at a point were claimed to give a title to a large area for which such occupation was supposed to have a representative effect, it was an obvious idea to use geographical arguments in support of the representative character asserted, arguments tending to show that the area claimed was a natural unit of which possession might be acquired at a point, just as the purchaser of an estate may receive livery of seisin at the entrance to it. Again, when an inchoate title was claimed to an area larger than that of the actual occupation, it was an obvious idea to fortify that title, political in its substance, by political arguments tending to show that the area claimed was that which for the purposes of government would properly or most conveniently be connected with the occupied part. Under the Berlin principles there will be little room for arguments of either kind, because the limits of the intended

acquisition will have been notified with some degree of precision and discussed at once if thought exorbitant, nor on the general modern principle will any arguments prevail against a failure to establish a sufficient authority by the time that it is required. Not much is therefore likely to be heard in future of the class of considerations referred to, but they must be noticed for their historical interest, and because their usefulness is not even now absolutely excluded. Titles must be judged by the state of international law at the time when, if at all, they arose[1]; and again, a notified limit to which no objection was made may be shown by later surveys to be so badly described as to be incapable of identification on the spot, while the colonisation of different states may be advancing towards it from respective sides.

Among the geographical arguments the two which have played the greatest part in history are those of watershed and middle distance. They were laid down as follows by the negotiators of the United States in the disputes between that power on the one hand and first Spain and afterwards Great Britain on the other hand, during the first half of the nineteenth century.

"That whenever any European nation takes possession of any extent of sea coast, that possession is understood as extending into the interior

[1] This principle, about which there can be no dispute, was invoked by Venezuela in the arbitration with Great Britain about the Guiana boundary. It is worth while to notice that in the cases of the *Cape Horn Pigeon* and three other vessels, belonging to United States citizens and molested by Russian ships of war on the charge of sealing in Russian waters, M. Asser, arbitrator, by his sentences in all the cases dated 29 November 1902, after reciting that according to the declarations exchanged between the two governments he was to decide by the general principles of the law of nations and the spirit of the international agreements applicable to the matter, proceeds thus: *qu'ensuite il a été reconnu que cette stipulation n'aura aucune force rétroactive, et que l'arbitre appliquera aux cas en litige les principes du droit des gens et les traités internationaux qui étaient en vigueur et obligatoires pour les parties impliquées dans ce litige, au moment où la saisie des navires a eu lieu. Revue de D. I. et de L. C.*, 2e série, tome 5, pp. 76, 80, 86, 93. There was no question in these cases of any change in a rule of international law, but in one of them it was necessary to exclude a treaty as inapplicable by its date: *ib.*, p. 89.

country to the sources of the rivers emptying within that coast, to all their branches and the country they cover, and to give it a right in exclusion of all other nations to the same.

"That whenever a European nation makes a discovery and takes possession of any portion of that continent, and another afterwards does the same at some distance from it, where the boundary between them is not determined by the principle above mentioned the middle distance becomes such of course[1]."

The first of these principles would lead to the conclusion that France, while she held Canada and Louisiana, was entitled to all the basins of the St Lawrence and Mississippi, the mouths of which rivers she had discovered and taken into her possession, except indeed such portions of those basins as were comprised within the settled area of the English colonies or were well understood to belong to the Spanish viceroyalty of Mexico. But during the negotiations with England in 1861 France repudiated any such claim, and proposed that the Indians "between Canada and Louisiana, as also between Virginia and Louisiana, should be considered as neutral nations, independent of the sovereignty of the two crowns, and serve as a barrier between them[2]." The United States however, when they had purchased from France the right which she had in Louisiana by discovery or otherwise, contended against Spain, which was still in contact with the Mississippi basin from the side of Mexico, that "by the discovery and possession of the Mississippi in its whole length and the coast adjoining it, the United States are entitled to the whole country dependent on that river, the waters which empty into it and their several branches, within the limits on that coast[3]." And, later, they claimed against Great Britain on the same principle the whole basin of the Columbia or Oregon river, to the mouth of which they asserted a right on the grounds which we have seen above[4]. Here the impossible magnitude of the pretensions to which the doctrine of watershed would lead was illustrated by the fact that British posts had been established on the head waters of that great river, by

[1] These were the first and second of the three principles mentioned in the note on p. 104, above.

[2] Twiss, *The Oregon Question examined*, p. 307.

[3] Twiss, quoting Messieurs Pinckney and Monroe; *ib.*, p. 248.

[4] P. 100.

adventurers crossing the mountains from the side of the Atlantic through British territory, and therefore not chargeable with having taken unfair advantage of any discoveries at its mouth. This claim was settled by a compromise in the Oregon treaty of 1846; and such has been the usual fate of watershed claims, but the principle of middle distance, where the points between which it is to be measured are not very far apart, has been more fruitful of results.

A third claim of a geographical nature is that to the back country (*hinterland* in German) to an indefinite extent behind a coast of which possession has been taken. In the charters granted by the English or British crown to many of the colonies which afterwards became the United States, their limits were defined as stretching westward from definite parts of the Atlantic coast to the Pacific, but this must be taken as intended to operate between the colonies and the crown and between adjoining colonies: no pretension of so far-reaching an extent was advanced by Great Britain against foreign states. Within more moderate limits the claim to back country is political as well as geographical, since it will usually be from the coast at the back of which it lies that that region can most easily be reached, and the state which has established its government on the coast will be acting within its right if it hinders another state from using its territory as one of transit for the purpose of setting up a possession adverse to it in the interior, and indeed a state which attempted to do so would be playing an unfriendly part. The coast state might regard itself as enjoying a sphere of interest beyond the range of its effective occupation. But it is often possible to reach an interior otherwise than from the nearest coast, and where this is so it can only be within moderate limits of space, and for a moderate duration of time proportioned to the urgency of the need of protection for trade and settlement in the interior, that a sphere of interest radiating from the nearest coast will properly command international respect. Thus considered, the claim to back country has an affinity with that by continuity or contiguity, which was put forward by the United States in their controversies above referred to about their western and north-western boundaries. "It will not be denied," Mr Gallatin wrote, "that the extent of contiguous

territory to which an actual settlement gives a prior right must depend in a considerable degree on the magnitude and population of that settlement, and on the facility with which the vacant adjoining land may within a short time be occupied, settled and cultivated by such population, as compared with the probability of its being thus occupied and settled from another quarter[1]." Our observation on that argument would be that it lays too much stress on an always uncertain future, tending as it does to keep areas open indefinitely for appropriation, while the true stress lies on the presence in the areas of effective authority when required. Indeed the claim by contiguity so explained is too nearly equivalent to the "manifest destiny" invoked by popular rhetoricians.

Purely political arguments fell under the consideration of the Baron de Lambermont, in his award of 17 August 1889, between the British and German companies on the farm of the island of Lamu. The case turned on the effect in the circumstances of the acts and engagements of the Sultan of Zanzibar and his predecessor, but the eminent arbitrator laid down a principle which extends to the title to territory. "Although," he said, "considerations based on economic and administrative interests or on political convenience may throw light on the advantage or disadvantage of a solution conformable to the views of one or other party, such reasons cannot stand in place of a mode of acquisition recognised by international law[2]." But the political consideration of security cannot be ruled out like that of convenience or interest. "When," says Sir Travers Twiss, "a nation has discovered a country and notified its discovery, it is presumed to intend to take possession of the whole country within those natural boundaries which are essential to the independence and security of its settlement[3]."

[1] Twiss, *The Oregon Question examined*, p. 311: see also p. 301. Mr Calhoun, writing to Mr Pakenham on 3 September 1844, treated the grants as far as the Pacific made in the colonial charters mentioned in the text as based on the "right of continuity," and the treaty of 1763 as transferring to France the British title so arising: 1 Wharton 6, 7. But this is erroneous, for the limits described in the charters had not been made by Great Britain the subject of an international claim.

[2] 22 *Revue de D. I. et de L. C.*, p. 353.

[3] *Law of Nations, Peace*, 2nd edn, p. 205.

And the same authority says that "where the control of a district left unoccupied is necessary for the security of a state and not essential to that of another, the principle of *vicinitas* would be overruled by higher considerations, as it would interfere with the perfect enjoyment of existing rights of established domain[1]." But the consideration of security can hardly be relied on as important in the title to territory except for very small areas contiguous to real settlements.

Islands in the Sea.

We shall find that the sea is territorial water, belonging to the sovereign of the coast, whether of the mainland or of an island, for a distance from the coast which is generally taken as three nautical miles. If therefore an island lies within that distance either from the mainland or from another island, there can be no difficulty in admitting that it belongs to the sovereign of the latter, in the absence of any title to the contrary. We do not know whether there is an instance of such contrary title, but it might conceivably arise from an island having been effectively occupied before a title was acquired by any state on the opposite coast, or both the island and the opposite coast might belong to the class of old countries, the titles to them not being derived from any original root but having been handed down immemorially either by cession and succession or by unbroken enjoyment.

If an island lies entirely outside the range of territorial water measured from the mainland or from any other island, the original acquisition of title to it or to any part of it must depend on the same principle as the original acquisition of title to a part of a continent. Thus in the protocol which was signed at Madrid between England, Germany, and Spain on 7 March 1885, the two former powers recognised Spanish sovereignty over the Sulu Archipelago, including "the places effectively occupied as well as those places not yet occupied." If we regard the other stipulations of the protocol as containing the price of the recognition of Spanish sovereignty over the

[1] *The Oregon Question examined*, p. 174.

unoccupied parts of the archipelago, and the recognition of it as existing over the occupied parts as standing on its own merits, we may agree with Holtzendorff in interpreting the whole as an application of the principle of effective occupation[1]. The political arguments that may be drawn from the greater or less proximity of an island to the opposite coast cannot stand in the place of a title depending on received legal rules. They may furnish ground for political action, but even the argument founded on the security reasonably due to the opposite coast must depend too much on the circumstances to be the foundation of any positive canon. There is on record a case in which the claim to islands as dependencies of a coast was advanced to an extravagant extent. The Falkland Islands are considered to have been discovered under Spanish auspices by Amerigo Vespucci in 1502, but were first occupied by a French company of St Malo in 1764, whence their French name of Malouines. Spain claimed them as "a dependence of the South American continent," and Louis XV surrendered them on the payment by Spain of an indemnity to the company. It is said that Lord Anson, when first Lord of the Admiralty in 1754, had contemplated occupying the islands, but that the British government abandoned the scheme in deference to Spanish objection. The complacency of France is easily explained by the political and family connection of its court with that of Spain, and there is no reason to attribute that of England to any but political causes; and Calvo, who maintains the justice of the Spanish title, appears to put it on the ground of priority of discovery and not on that of dependence on the continent, though he relates the claim made on that ground[2]. As a counter-instance of greater moderation the statement of the Under-Secretary for Foreign Affairs may be mentioned, "We are advised that the fishing off the Seven Stones is not within British territorial waters, and the right of foreign boats to fish there cannot therefore be contested[3]." These are rocks at the mouth of the Bristol Channel of which occupation would be

[1] Parliamentary Paper c. 4390; *Handbuch des Völkerrechts*, vol. 2, p. 266, note 12.

[2] Calvo, *Le Droit International théorique et pratique*, vol. 1, § 218.

[3] *Times*, 1 April 1903; Questions not answered orally.

impossible, but, not to mention the question whether they might not be considered as dependencies of the Scilly Isles, from which they are only a few miles distant, the fishing there would be dangerous without the lightship which England maintains in proximity to the Stones.

If an island should lie partly within and partly outside the range of territorial water measured from the mainland or from another island, and the acquisition of an original title to it came into question, it would be difficult to contend that such a title could be gained to any part of it otherwise than by effective occupation.

Lord Stowell once had before him the case of "a number of little mud islands composed of earth and trees drifted down by the river [Mississippi], which form a kind of portico to the mainland." He held "that they are the natural appendages of the coast on which they border, and from which indeed they are formed. Their elements," he said, "are derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in the books of law, *quod vis fluminis de tuo praedio detraxerit*, and *vicino praedio attulerit, palam tuum remanet*, even if it has been carried over to an adjoining territory." He therefore decided that these islands were a part of the territory of the United States, and that, they being neutral, the three miles within which belligerent capture could not lawfully be made were to be reckoned from the islands outwards[1]. It will be observed that Lord Stowell did not mention the distance of the islands from the mainland, whence we may conclude that he did not regard it as important where "the principle of alluvium and increment" applies.

[1] *The Anna*, 5 C. Robinson 373.

CHAPTER VI.

MINOR TERRITORIAL RIGHTS.

In this chapter we propose to discuss certain rights or claims in relation to territory which fall short of sovereignty in its fullest shape, either because care is taken to distinguish them from it in name though in substance there is little distinction, which is the case of colonial protectorates, or because they disclose rather the desire of acquiring sovereignty than its acquisition, which is the case of some of the so-called spheres of influence or interest, or because they are terminable, which is the case of leases properly so called, or for any other reason.

Colonial Protectorates.

It will have been observed that Art. 34 of the Berlin Conference lays down the same condition of notification for taking possession of territory on the coast of Africa and for assuming a protectorate there, but that it is only to occupations that Art. 35 attaches the obligation of insuring the existence of a sufficient authority[1]. The draft prepared by a committee included protectorates in Art. 35 also, but on the discussion of that draft in the commission they were omitted in that place on the motion of the British plenipotentiary, Sir Edward Malet. After that omission had been decided on, the French plenipotentiary, M. de Courcel, obtained the substitution in Art. 35

[1] See above, p. 106. The translation in the Parliamentary Paper c. 4361 says, "the *establishment* of authority," but the French text has *existence*, and the difference should be noted with reference to what follows in the present paragraph. The proceedings of the conference referred to will be found in the Annex no. 1 to Protocol no. 8.

of the words "insure the existence of authority" for the words "establish and maintain a jurisdiction." He said that "the latter form would lead to the supposition that in every new occupation it would be necessary to introduce organic innovations for the distribution of justice, while it might be that in certain regions the existing institutions would be found to be sufficient and would simply be preserved." It follows that taking possession in Art. 34 and occupation in Art. 35 were understood not to apply exclusively to uncivilised countries, but to include the annexation by a signatory power of territory possessing institutions capable of meeting its needs at least for a time after the appearance of white men in it, in a word, of territory belonging to some state. But if state territory was in the mind of the conference as a possible object of taking possession or occupation, terms more familiar in relation to uncivilised countries, much more must this have been the case when protectorates were mentioned, a term not then familiar except in relation to states[1]. It is true that a different use of the term was then beginning. In the general haste to partition the globe effective occupation was beginning to seem too slow a process. If a complete title could only be gained by means of it, at least it might be possible for a power to put in a provisional claim to a region before it suited its policy even to enter on the gradual process of effective occupation. For this purpose the name of protectorate was extended to cases where the only possible subject of protection was a native population living in that primitive social condition which, as we have seen, has never been regarded by white men as presenting an obstacle to their own assumption of political power. These are the colonial protectorates, and the name had the double advantage of giving a flavour of international law to a position intended to exclude other states before such exclusion could be placed on the ground of duly acquired sovereignty, and at the same time of allowing that position to be abandoned with less discredit than attaches to the abandonment of sovereignty, if the country should be found less valuable or its retention more costly than had been hoped. Protectorates of both kinds must be considered as having been

[1] See above, p. 22, as to protectorates over states.

included in Art. 34 of Berlin, though Sir Edward Malet's objection to their being mentioned in Art. 35 probably arose from looking only at the operation of that article, if they were mentioned in it, on the normal case of a protectorate, namely that in which local institutions not incapable of meeting the needs of white men to a certain extent would exist.

The first step which a government takes towards establishing a colonial protectorate usually is that an agent of it, to whom the name of consul is often given, concludes treaties with native chiefs, or that the government adopts the treaties concluded with native chiefs by its subjects as private adventurers. To proceed by agreement is always desirable and generally possible, though too often force is the first means employed against the indigenous population. But such agreements ought to be strictly limited to the things which the natives can understand, among which property and its transfer are commonly to be found, but certainly not the complicated arrangements of a modern state.

Within that limit the rights acquired from the natives may be of legal validity even under the white government to be ultimately established; outside it they have not so much as moral validity, either as a foundation for such a government or for any other purpose. But the limit has often been flagrantly transcended, especially by private adventurers. An example is a treaty concluded in 1890 by the representative of a British company with a drunken savage dignified as "king or chief of Manika," who was made to grant to the company a perpetual monopoly of almost everything that white men can do, including banking and electric lighting[1]. Good examples on the other hand are furnished by the treaties which the British consul signed in 1889 with the Makólolo chiefs of Nyasaland, providing for peace, free access to all parts of the country, the right to build houses and possess property according to the laws in force there, liberty to trade and manufacture, and the decision of differences by a duly authorised representative of the British crown; and binding the chiefs not to cede any territory to any other power, or to enter into any treaty with any foreign

[1] Parliamentary Paper c. 6495, p. 28.

government except through and with the consent of the British crown[1]. Such a form of treaty, in which no attempt is made to derive sovereignty by cession from natives who do not possess the ideas and habits implied in a state, is in accordance with principles more than once recognised by the British parliament. The Pacific Islanders Protection Act of 1875 enacted that it should be "lawful for Her Majesty to exercise power and jurisdiction over her subjects within any islands and places in the Pacific Ocean, not being within Her Majesty's dominions nor within the jurisdiction of any civilised power, in the same and as ample a manner as if such power or jurisdiction had been acquired by the cession or conquest of territory[2]." And the Foreign Jurisdiction Act of 1890 enacted that "where a foreign country is not subject to any government from which Her Majesty the Queen might obtain jurisdiction by treaty, capitulation, grant, usage, sufferance or other lawful means, Her Majesty shall by virtue of this Act have jurisdiction over Her Majesty's subjects for the time being resident in or resorting to that country[3]." It is not therefore from the natives that the powers and rights constituting a colonial protectorate are derived, and the absence of local institutions that can be utilised obliges the state assuming such a protectorate to put its own personality forward and itself act wherever required throughout the region comprised in it. Hence, as Mr Hall justly observes, "the powers exercised in a [colonial] protectorate are in fact territorial. Each and every sovereign power is territorial in that it obliges every person within the territory of the state or community to the extent of its applicability; and inversely, every power which extends over the whole territory is a part of or an emanation from the state sovereignty[4]."

But a colonial protectorate, emanation though it be from the sovereignty of the state assuming it, differs from the establishment

[1] Parliamentary Paper C. 5904, p. 156.

[2] St. 38 and 39 Vict., c. 51, s. 6.

[3] St. 53 and 54 Vict., c. 37, combining with s. 2 the words in the preamble to which that section refers.

[4] *A Treatise on the Foreign Powers and Jurisdiction of the British Crown*, § 98, pp. 224, 225. The insertion of the word "colonial" is required by the context.

of that sovereignty in the country over which it is assumed; there is no annexation by the state in question. This distinction, even while it lasts, is attenuated by the circumstance that a colonial protectorate is intended by the state assuming it to exclude the action of other powers as completely as it would be excluded by annexation, since otherwise the protectorate would not have the desired effect of earmarking the country for the future enjoyment of the assuming state. And the distinction is usually transitory as well as attenuated, for the action taken in a colonial protectorate, if persevered in, necessarily has the effect of preparing the way for annexation and leading up to it. Soon the country is no longer described as a protectorate but as a colony, or it is incorporated in an adjoining colony, and even before that stage is reached the difference between the protectorate and a dominion may have become imperceptible, especially where its administration is closely connected with that of an adjoining colony. The British protectorate of Bechuanaland presents a remarkable case. When established in 1885 it was the most advanced post of British rule or influence towards the interior of South Africa, as is usual with colonial protectorates, but it has ceased to be so. Not only has the territory of the South African Republic, which lies to the east of it, been acquired by conquest, but Rhodesia, which lies to the north of it, is as much British soil as is British India, having been acquired by the British South Africa Company, and therefore for the crown, as are all the territorial acquisitions of subjects, and its administration having been in part taken over by the crown. The Bechuanaland Protectorate therefore is nearly surrounded by British territory, and a strip of it, through which the railway runs, has been made indisputably British. It would therefore be pedantic not to consider the whole as British territory in the sense of international law, subject for international purposes to the rights of Khama and the other chiefs which have been acknowledged by agreements with them.

A colonial protectorate then may be defined as a region in which there is no state of international law to be protected, but which the power that has assumed it does not yet claim to be internationally its territory, although that power claims

to exclude all other states from any action within it[1]. The British protectorates in Africa which appear still to bear that character are those of the Gambia, Sierra Leone and Lagos, respectively adjoining the three colonies of those names, and those of Northern and Southern Nigeria, British Central Africa, British East Africa, Uganda and Somaliland. In the Indian Archipelago there is a protectorate which the British government proclaimed in 1888 over the so-called state of North Borneo, to which name there is nothing to answer except the territory held by the British North Borneo Company under grants made by the Sultans of Brunei and Sulu, both Mahometan rulers, and which is now administered by the company subject to its appointment of the governor being approved by the British Secretary of State. The Sulu Archipelago has passed to the United States, and Brunei was taken in 1888 under British protection of the ordinary international kind. So the British North Borneo Protectorate is anomalous. Being composed of fragments detached from Mahometan states it cannot be regarded as a colonial protectorate in an uncivilised region, but the nominal state over which protection is asserted seems to have been invented for the purpose of preventing the annexation of the country, which would have followed if it had been treated as an acquisition made by the company.

Although it is only in the territories occupied by them on the African coast that Art. 35 of Berlin expresses the obligation of the powers to assure the existence of an authority sufficient to cause acquired rights to be respected, there can be no doubt that the principle of that obligation applies equally to colonial protectorates. A power which pretends to exclude the action of other powers from a region lying open to white enterprise must itself supply the civilised action necessary for the safeguard and

[1] The Institute of International Law, at its meeting at Lausanne in 1888, adopted a set of articles in the first of which the conditions for the effective occupation of a territory *à titre de souveraineté* were laid down, and of which the second was this: *Les règles énoncées dans l'article ci-dessus sont applicables au cas où une puissance, sans assumer l'entière souveraineté d'un territoire, et tout en maintenant avec ou sans restrictions l'autonomie administrative indigène, placerait ce territoire sous son* PROTECTORAT. Annuaire, 10me volume, p. 202; *Tableau général de l'Institut de Droit International*, p. 146.

regulation of such enterprise, in the degree in which on a fair construction it is from time to time necessary, equally whether the pretension to exclude is based on annexation or on the assumption of a protectorate[1]. And no action can be adequate to meet such needs which does not include the exercise of jurisdiction within the region over the subjects of foreign powers as well as over those of the power assuming the protectorate. This is so clear that a state which acquiesces in its own exclusion from a given territory must be understood to acquiesce in the exercise there of jurisdiction over its subjects by the state to which it leaves the territory free. Accordingly "the law regulating jurisdiction in the German protectorates, as modified by alterations introduced by imperial decree of 15 March 1888, expressly declares that it is competent to the imperial authority to extend jurisdiction over all persons irrespectively of their nationality, and to place natives of the territory on the same footing as German subjects with regard to the right of flying the imperial flag[2]." And by the first article of the General Act of the Brussels Conference of July 1890 it is declared that "the most effective means for counteracting the slave trade in the interior of Africa are the following: (1) progressive organisation of the administrative, judicial, religious, and military services in the African territories placed under the sovereignty or protectorate of civilised nations"; while in the second to the seventh paragraphs are prescribed the establishment of occupied stations, roads, railways, inland steam navigation, telegraph lines, and the maintenance of restrictions on the importation of fire-arms and ammunition. Hall, quoting this, justly observes that "evidently on the one hand acts of the nature contemplated and prescribed compel extensive interference with the internal sovereignty of a community, and involve a commensurate as-

[1] See the resolution of the Institute of International Law which, by the effect of Arts. 1 and 2, quoted respectively on pp. 111 and 124, requires even in protectorates the establishment of a responsible local power.

[2] Hall on the *Foreign Powers and Jurisdiction of the British Crown*, p. 208. The reference is to the *Gesetz betreffend die Rechtsverhältnisse der deutschen Schutzgebiete vom* 15 *März* 1888, Art. 2, § 7, in the *Reichsgesetzblatt* of that date.

sumption of sovereignty by the protecting state; on the other the objects aimed at can hardly, if at all, be attained compatibly with the exemption of European traders and adventurers from the local civilised jurisdiction[1]."

But the Orders in Council which regulate the exercise of jurisdiction in British colonial protectorates were at first so drawn as to confer it, or to recognise its existence, only over British subjects and not over those of other states. There are several ways in which a state may acquire jurisdiction outside its dominions. One is where an oriental power, without becoming subject to a protectorate, grants to foreign consuls jurisdiction over their respective nationals within its territory. Then the consular jurisdiction so founded may be carried a step further by usage; for the usage of European states by which differences between their subjects in the East are submitted to the jurisdiction of the defendant's consul amounts to consent, which is another lawful source of jurisdiction[2]. But further, if a state becomes subject to a protectorate, its sovereignty is divided between itself and the protecting state according to the terms of the arrangement between them; and there seems to be no reason why those terms should not assign to the latter the jurisdiction over all foreigners within the territory of the former. Third states might object to the establishment of a particular protectorate so defined, just as they may object to any international arrangement which they conceive to be detrimental to their just interests, but no general principle of international law would be violated by it. Thus France, by the treaties between her and her protected states of Annam and Cambodia, has acquired jurisdiction over foreigners in them, and the French Court of Cassation has by fair reasoning deduced a similar power from the terms, by no means express, of the treaty with the protected sultan of Johanna or Anjouan[3]. By the declaration of 16 December 1892 between Great Britain and Zanzibar, when the defendant or accused is a subject of the latter or of some other non-Christian power not represented by consuls and

[1] Hall, u. s., p. 207. See also pp. 213, 214.

[2] See Dr Lushington in *Papayanni* v. *Russian Steam Navigation and Trading Company*, 2 Moore P. C. 183.

[3] Hall, u. s., p. 209.

a British subject is concerned, the judicial power of the sultan is delegated to the British sovereign. All these cases have the common feature that the jurisdiction concerned in them is obtained from a foreign government, and fall within sect. 1 of the Foreign Jurisdiction Act 1890. Colonial protectorates fall under sect. 2 of that Act, quoted above[1], as being exercised in countries not subject to any government from which the British sovereign might obtain jurisdiction, and that section gives him jurisdiction only over his own subjects. It might well however have been considered that the assumption in such protectorates of jurisdiction over the subjects of foreign states would be warranted as well by the nature of the case as by foreign example, and this view appears to have since been taken, for in 1893 the Pacific Order in Council provided that consent to the jurisdiction should be required from foreigners or natives only "in islands and places which are not British settlements or under the protection of Her Majesty[2]." In further support of the same view Hall, soundly as we think, brings forward the analogy which the assumption of a colonial protectorate bears to conquest, its territorial character making it practically equivalent to the assumption of some part at least of sovereignty, notwithstanding the care taken to distinguish it from complete annexation. And, as he argues, since in cases of conquest the crown acquires full jurisdiction over every person on the soil without the necessity of waiting for the sanction of parliament, the jurisdiction over foreigners in colonial protectorates, if placed on this ground, needs no support from the Foreign Jurisdiction Act 1890[3]. It would indeed be difficult to reconcile its repudiation with the assertion of jurisdiction over the native inhabitants of such protectorates, which is believed to be the constant practice of British authorities.

[1] P. 122.

[2] Hall, u. s., pp. 215, 231.

[3] *Ib.*, pp. 224, 225.

Spheres of Influence or Interest.

(A.) Agreements for Reciprocal Abstention from Territorial Expansion.

Colonial protectorates differ so little from annexations, especially in the responsibilities which they involve, that they could not satisfy the haste which characterised the latter part of the nineteenth century for the provisional appropriation of territories in advance of anything resembling occupation. A more shadowy form of earmarking was therefore invented, in what are called spheres of influence or interest. It cannot be expected that these shall be definable either in the form of their acquisition or in their effect when acquired: such precision would defeat the object. We can only notice the different modes of international action which have given occasion for their being claimed.

The most frequent of those modes of international action has been the conclusion between two powers of an agreement by which each promises not to pursue a policy of territorial expansion beyond a certain line. As an example we may take the declaration of 6 April 1886 between England and Germany, by which a certain line was drawn in the Western Pacific, and a reciprocal engagement was made in these terms:

"Germany [Great Britain] engages not to make acquisitions of territory, accept protectorates, or interfere with the extension of British [German] influence, and to give up any acquisitions of territory or protectorates already established, in that part of the Western Pacific lying to the east, south-east, or south [west, north-west, or north] of the said conventional line."

This was accompanied by some collateral stipulations, as may always be the case with such arrangements. Nothing can be more simple than an agreement of the kind, if taken as it stands. Each contracting party promises to abstain from every form of aggrandisement on the other side of the boundary laid down. On its own side each must pursue its aggrandisement, if at all, by the methods and subject to the conditions applicable in other cases to the acquisition of possessions or protectorates. Until that is done, and except so far as it is done, nothing is acquired by either. If either meets on its own side of the boundary with a third power, the rights of the

latter are intact. The agreement is *res inter alios acta*, and cannot be quoted against it.

It is probable that the earliest of these agreements for reciprocal abstention were concluded without a thought of their leading indirectly to anything more than is contained in their tenour. As precluding jealousies and conflicts between the powers signing them in the parts of the world to which they related, they were valuable enough, simply as they stood, to make it unnecessary to search for any other motive for them. But every legal practitioner or observer of human nature knows how inveterate is the habit of appealing to an "understanding" when agreements fail; and so it was inevitable that when an agreement between two powers for reciprocal abstention has been published, and a considerable time has elapsed without third powers protesting or signifying their reserves, a popular notion should arise that the obligation of abstention is extended to third powers by an "understanding," and that a sphere of influence is thus created generally and not merely as between the parties. In strict law there are two answers to that notion. One is that silence only damages where there is occasion for speech, and that an agreement by state *A* to abstain from territory *X*, since it does not interfere with any rights or expectations of state *B* relating to that territory, does not call on state *B* for speech. The other is that the thing which it is attempted to build on the foundation of silence, namely a commencement of appropriation without a commencement of effective occupation, does not exist in international law. The utmost that can be said in favour of the notion is that state *A*'s agreement with state *C* to abstain from territory *X* encourages a hope in state *C*, and that it would be unfriendly in state *B* to thwart that hope after it has long been entertained without warning. This is true, and it would be foolish to ignore the great part which unfriendliness and the suspicion of it, even unaccompanied by any violation of legal right, play and are always likely to play in determining the international conduct which is the practical interpretation of international relations. On the other hand a line of argument which would oblige a state to signify at once its reserves about an agreement not in

itself concerning it, reserves which if they were not forced into publicity the occasion might never arise for disclosing, would seem rather to tend towards multiplying the exhibitions of jealousy and unfriendliness between states than towards avoiding them. Hall, in discussing the question, points out that the ambiguous character of spheres of influence will make it advisable to shorten their duration. "It is not likely," he says, "that an influencing government will find itself able for any length of time to avoid the adoption of means for securing the safety of foreigners, and consequently of subjecting the native chiefs to steady interference and pressure. Duty towards friendly countries and self-protection against rival powers will alike compel a rapid hardening of control, and probably before long spheres of influence are destined to be merged into some unorganised form of protectorate analogous to that which exists in the Malay Peninsula[1]."

The most important diplomatic incident connected with this question is that caused by the French occupation of Fashoda on the Nile in 1898. By the Anglo-German agreement of 1 July 1890 Germany had recognised a British sphere of influence extending to "the western watershed of the basin of the Upper Nile[2];" and by the Anglo-Congolese agreement of 12 May 1894 the sovereign of the Congo State "recognised the British sphere of influence as laid down in the Anglo-German agreement of 1 July 1890," and Great Britain undertook to give that sovereign a lease of certain territories carved out of that sphere, which during his reign would include Fashoda but would afterwards be diminished in extent[3]. By an exchange of letters of even date with the agreement, this lease was to be subject to "the claims of Turkey and Egypt in the basin of the Upper Nile[4]." We may here pause to note the high value which granting a lease out of it shows to have been placed on the interest created by Germany's agreement of abstention. But to proceed with our narrative, by the Franco-Congolese agreement of 14 August 1894 the Congo sovereign, in deference to

[1] *Foreign Powers and Jurisdiction of the British Crown*, p. 230.
[2] Hertslet, map of Africa by Treaty, p. 642.
[3] *Ib.*, p. 1008.
[4] *Ib.*, p. 1012.

the protest of France, undertook not to use the rights given him by the lease in a region including Fashoda[1]. Finally, on the overthrow of the Khalifa in 1898 by Lord Kitchener in command of Egyptian and British forces England seized the opportunity of asserting the dormant claim of Egypt to Fashoda. It is as an Egyptian possession, in which England shares in consideration of the part she took in its reconquest, that the place has been governed since the retirement of the French from it[2], and the arguments founded on the British sphere of influence which were used in the discussion with France may perhaps have been so used only as makeweights, though something may have been due to the situation as it concerned Egypt not having then been regulated. In any case they must be noted as expressions of opinion on the subject now occupying us. Lord Salisbury said to the French ambassador that "France had received repeated warnings that a seizure of land in that locality could not be accepted by Great Britain. The first warning was the Anglo-German agreement, which was communicated to the French government, and the provisions of which as regards the Nile were never formally contested. The next warning was given by the agreement with the king of the Belgians, the sovereign of the Congo State, the concession made by whom in the Franco-Congolese agreement "did not diminish the significance of the act as an assertion of her rights by England." His lordship next referred to a speech made in 1895 by Sir Edward Grey, then under-secretary of state for Foreign Affairs, respecting the intentions of England, to which the French foreign minister was officially informed in 1897 that Her Majesty's then government adhered. And he said: "if France had throughout intended to challenge our claims, and to occupy a portion of this territory for herself, she was bound to have broken silence[3]."

The ultimate result of the same incident was a delimitation of the British or Anglo-Egyptian and French spheres of influence

[1] Hertslet, op. cit., p. 1021.

[2] See the Anglo-Egyptian convention of 19 January 1899, in the Egyptian *Official Journal* of that date and the *Times* of 20 January 1899. The Fashoda incident has been noticed for another purpose, above, p. 66.

[3] Lord Salisbury's despatch of 6 October 1898, in Parliamentary Paper, Egypt, no. 3, 1898: *Times* of 25 October 1898.

in North Central Africa, by which the line between them was drawn on the west of Darfur, leaving on the French side of it Wadai, which lies south of Tripoli, a Turkish province which Italy had long regarded as her future share in possible dismemberments of the Turkish empire. This gave great offence to Italian opinion, as though it were a condemnation of the claim of Italy to extend her influence or interest to the natural back country (*hinterland*) of Tripoli, in the case of her acquiring that province. And thus another instance was furnished of the impossibility of limiting the international effect of reciprocal agreements for abstention to their strict terms as between the parties to them, at least so far as that effect may consist in creating opinion and situations dependent on opinion.

(*B.*) *Agreements not to alienate territory.*

Another mode in which it has been recently attempted to create spheres, perhaps this time to be more correctly described as of interest rather than of influence, is by agreements in which an oriental state binds itself not to alienate certain territory. Such are the agreements which China made in 1898 with Great Britain, that she "will never alienate any territory in the provinces adjoining the Yang-tsze to any other power, whether under lease, mortgage, or any other designation"; with France, not to alienate any portion of the provinces of Kwangtung, Kwangsi and Yunnan; and with Japan, not to alienate the province of Fokien. China also in 1897 promised France not to alienate the island of Hainan. By these means the respective stipulating power makes known to the world that it claims, next to the state actually in possession, an interest in the given territory. If the state actually in possession should so completely break up that no fragment of it can be treated as succeeding to its international obligations, the agreement would fall to the ground for want of a party bound by it, but the stipulating power might use against third states the publicity of the agreement, and the fact that it had long remained without protest by them, as the foundation for a right of succession in the given territory. The claim would be similar to that by which it is attempted to establish the generally binding char-

acter of spheres of influence created by reciprocal agreements of two powers for abstention from territorial expansion, and the same topics of argument apply for and against both. In the mean time the agreement sanctions no interference in the territory with the state actually in possession. What it creates is a questionable reversionary right, which, so far as it exists, must be called territorial since it is to territory that it applies, and must therefore be classed among the minor territorial rights.

Leases.

In recent times there have been many cases in which an interest in territory has been granted by one state to another under the name, drawn from the analogy of property, of a lease, in French *bail*. Such are the leases granted by China in 1898 of Port Arthur and Talienwan, now Dalny, to Russia for 25 years; to England of Weihaiwei "for so long a period as Port Arthur shall remain in the occupation of Russia," and of Kaulung for 99 years; to Germany of Kiauchau for 99 years; and to France of Kwangchauwan. Such also are the leases of different parts of his mainland dominions which the sultan of Zanzibar granted to the British East Africa Company in 1888 and 1890 for 50 years, extended in 1891 to perpetuity, and now held by the British crown. Such too are the leases which Great Britain and the Congo State granted to one another of certain African districts in 1894, to endure "so long as the Congo territories as an independent state or as a Belgian colony remain under the sovereignty of His [Belgian] Majesty or His Majesty's successors," except as to a part of that granted to the Congo State, which was to determine when the actual king of the Belgians should cease to be its sovereign[1].

When property is leased, the lessor retains a proprietary right which runs concurrently with the lessee's right of enjoyment[2]. If therefore the analogy were closely pressed, the state

[1] See above, p. 130.

[2] This statement is substantially true in all cases, though in English law the lessor's right is the actual freehold when the lease is for years and only reversionary when it is for a life, while in Roman law it is always the *nuda proprietas*. Even when the lease is in perpetuity, that is an *emphyteusis*, the emperor Zeno decided that the lessor remains the *dominus*.

which grants a lease of territory would be held to retain all the time some sort of sovereignty over it. This however would not suit the parties to such transactions as those which have been mentioned, since the lessee state requires the unrestricted use of the soil for the erection of fortresses and other purposes as well warlike as pacific, while the lessor state would object to the loss of its neutrality which would result from the use by the other of what was in any sense its territory in or in support of warlike operations against a third. We must then agree with Despagnet who, after remarking that the restoration of the territory at the end of the specified term is very unlikely, says that these pretended leases are alienations disguised in order to spare the susceptibility of the state at whose cost they are made. He adds the motive of avoiding disquiet to rival powers, but it cannot be imagined that any power would be deceived by the fallacious appearance[1]. The complete transfer of sovereignty for the specified term is also the official German interpretation of an international lease, the *Imperial Gazette* of Berlin having announced with regard to Kiauchau that "the Imperial Chinese government has transferred to the German government, for the period of the lease, all its sovereign rights in the territories in question[2]." On the other hand the official statement in the Russian press bore that Port Arthur and Talienwan, with the adjacent territories, had been "ceded in usufruct to the imperial government for a term of 25 years," and that this was an arrangement "safeguarding the integrity of the sovereign rights of China, and satisfying the essential needs of Russia alike as a maritime power and a territorial neighbour[3]." This may pass as rhetoric, but it cannot be doubted that the practical Russian view is the same as the German.

[1] § 394 *bis.* In an unsigned article in the *Revue Générale de Droit International Public,* edited by Mm. Pillet and Fauchille, it was said of the lease by England to the Congo State that the expression used ought not to cause any illusion about the real nature of the contract, and that a lease without any rent due from the lessee and without limit of continuance is not a true letting but an alienation : 1 *R. G. de D. I. P.* 380.

[2] *Times* of 6 January 1898.

[3] *Times* of 30 March 1898.

Rights to Occupy and Administer.

The treaty of Berlin, 1878, Art. 25, provides that "the [Turkish] provinces of Bosnia and Herzegovina shall be occupied and administered by Austria-Hungary," and goes on to attenuate that provision so far as concerns the sandjak of Novi-Bazar, a part of the vilayet or province of Bosnia, on the details relating to which the Austro-Hungarian and Turkish governments reserve to themselves to come to an understanding. By their convention of 21 April 1879[1] the two governments not only settled the details relating to Novi-Bazar, but made several stipulations concerning the territory to be occupied, one of which (Art. 6) was that "the question of the treatment of the inhabitants of Bosnia and Herzegovina living or travelling outside those provinces shall be regulated later by a special arrangement." It was also recited in the preamble that "the fact of the occupation of Bosnia and Herzegovina does not impair (*ne porte pas atteinte aux*) the rights of sovereignty of H.I.M. the Sultan over those provinces." Thus the Austro-Hungarian right in the occupied provinces, the extent of which might have been doubtful if it had rested on the treaty of Berlin alone, was made to appear as a right of internal administration, free except in the particulars provided for by the convention but devoid of the character of sovereignty, and unaccompanied by external powers. Nevertheless the Austro-Hungarian law of 3 November 1881 subjected the people of the occupied provinces to military service, which the eminent Russian jurist F. de Martens characterises as "undoubtedly an act which violates their conscience and their direct obligations to their legitimate sovereign the Sultan[2]." And the treaty of commerce of 1881 between Austria-Hungary and Servia, after stipulating various rights for the subjects of each party in the territory of the other, declared the treaty to be applicable to all countries comprised in the Austro-Hungarian customs territory, in which the occupied provinces had been included. Thereupon, a

[1] Holland, *European Concert on the Eastern Question*, p. 356.

[2] *Traité de Droit International*, French translation, vol. 1, p. 478.

Herzegovinian named Bochko having died in Servia in 1891, leaving property there which was claimed by his Herzegovinian heirs, the Servian court of first instance refused to apply the treaty on the ground that only Turkey had the right to conclude conventions regulating the legal position of Bosnians and Herzegovinians in foreign countries, an opinion shared by F. de Martens[1]. But the Court of Cassation at Belgrade reversed the decision on the ground that the objection to the treaty, although sound, ought to have been taken by the Servian legislature when voting on its ratification, and that as it had not done so the judicial power was bound. The Austro-Hungarian government maintained its view, and a new treaty of commerce with Servia in 1892 reproduced the article objected to[2].

In these circumstances the actual extent of the right of Austria-Hungary in the occupied provinces is the subject of controversy. Holtzendorff says that Austria, in introducing military service and establishing new courts of justice, overstepped the boundaries of occupation and administration, and did that for which international law can find no basis in her contract. But he adds that those dispositions have met with recognition by other powers, which, for example, have accepted the withdrawal from them of the consular jurisdiction which they enjoyed under the Turkish capitulations[3]. Bluntschli boldly carries the substantial right of Austria-Hungary up to the treaty of Berlin itself, saying in his criticism of that document: "She does not govern the country as the Sultan's mandatory and in his name but in her own name, she administers the country not on behalf of the Sublime Porte but in the interest of the populations. She is in *possession* of the sovereignty, which in theory continues to belong to the Sultan. The Sultan's right is a *nudum jus* without efficacy, a mere semblance of right[4]." On the other hand the Servian patriots, who see in Austria-Hungary the obstacle to the inclusion of

[1] u. s., p. 479.

[2] See articles by Professor Péritch in the *Revue de Droit International et de Législation Comparée*, 2me série, t. 3, nos. 50, 241, 398.

[3] Vol. 2, p. 116, note 5.

[4] 13 *R. de D. I. et de L. C.*, p. 585.

Bosnia and Herzegovina in a Greater Servia[1], and F. de Martens[2], represent the mission confided to Austria-Hungary for the pacification of those provinces as conditional, subject in case of failure to be recalled by the powers, which might then make or approve some other arrangement. To us it seems that the mission cannot have been assumed with such an understanding. It is always impossible to predict what may be the consequences of prolonged disorder in any part of the world, but a great power only accepts a position treated as assured, and not one in which the continuance of disorder under its rule is contemplated as a contingency.

It remains to observe that the right of Austria-Hungary in Bosnia and Herzegovina, whether it be one of practical though not nominal sovereignty or only one of internal administration, belongs to the dual monarchy. There is no reason why that monarchy, forming as it does one state of international law, should not have a dependency annexed to it, to be governed by its common ministries as Bosnia and Herzegovina are actually governed. Therefore the argument that annexation was impossible without saying whether it was to Austria or to Hungary is unsound.

By the Anglo-Turkish convention of 4 June 1878 and another, called an annex to it, of 1 July of the same year, the sultan assigned Cyprus "to be occupied and administered by England," and certain stipulations were made about its administration. The arrangement is the same as that for the provinces occupied by Austria-Hungary, both in the terms "occupy and administer" used to describe it and in the unconditional character and unlimited duration given to it[3], but in other respects

[1] 3 *R. de D. I. et de L. C.*, 2me série, p. 53.

[2] *Traité de Droit International*, vol. 1, p. 478.

[3] It is with great respect for his learning that we have to note an error into which F. de Martens has fallen in saying that Cyprus "is only occupied by the English conditionally, until the introduction of the promised reforms; as soon as they have been accomplished the island must be restored to Turkish administration": *Traité de Droit International* 1, 476. The convention of 4 June engages England in certain contingencies to join the sultan in defending certain territories by arms; the sultan promises in return to introduce reforms in those territories, "and in order to enable England to make necessary provision for executing her engage-

there are differences. The assignment of Cyprus is not based on any irremediable inability of the sultan to secure the peace of the island, which had not in fact been disturbed; the continuance of a Mahometan religious tribunal, to which there is nothing parallel in the Austro-Turkish convention, is stipulated; and England is to pay to the Porte an estimated annual excess of revenue over expenditure, while in the other case it was merely provided that the revenues of Bosnia and Herzegovina should be exclusively applied for those provinces. The administration of Cyprus is now conducted by a high commissioner, who acts "in the name and on behalf of His Majesty" the British sovereign, and makes laws and ordinances with the advice of a legislative council, subject to a power of disallowance retained by the crown, which can also legislate directly for the island by order in council. The extradition of criminals and accused persons is provided for, and, as in the Austrian case, the other powers have acquiesced in the supersession of the consular jurisdiction by the British courts. But "natives of the island of Cyprus are not considered to be protected subjects of the [British crown] in countries foreign to the Ottoman empire, or even in Egypt, still less therefore in other parts of the Ottoman dominions[1]."

There has therefore been a real dismemberment of the sovereignty of Cyprus. Along with the whole of its name the sultan retains some part of its powers. His right is not quite the *nudum jus* which Bluntschli finds for him in Bosnia and Herzegovina, but it is insignificant.

ment, H.I.M. the Sultan further consents to assign the island of Cyprus to be occupied and administered by England." The contingencies for the operations of the defensive alliance were afterwards affected by the signature of the treaty of Berlin, but there remains this one, "if any attempt shall be made at any future time by Russia to take possession of any further territories of H.I.M. the Sultan in Asia as fixed by the definitive treaty of peace." So, the engagement of England extending to all future time, the assignment of Cyprus as the necessary provision for enabling her to execute it, which is in no way made dependent on the introduction of the reforms, cannot be limited. The convention and annex are in Holland's *European Concert in the Eastern Question*, pp. 354–5.

[1] Hall, *Foreign Jurisdiction of the British Crown*, p. 226, note.

We may mention here, though only to exclude them from the list of minor territorial rights, spheres of influence of a wholly political character, the influence being exercised only over rulers and being at least actually unaccompanied by territorial pretensions, whatever pretensions of that kind may be destined to arise. Such are those of England in relation to Afghanistan, to the Shan states in the Indo-Chinese peninsula, and to the Arab chiefs at the back of Aden. It must further be observed that all the instances thus quoted stand in relation to the Indian empire of England, and cannot therefore be subjected to the classifications of European and American international law[1]. Agreements for exclusive or preferential privileges of an industrial or commercial nature have been obtained from China by some powers, as by Germany for Shantung, by France for mining rights in the area to be traversed by the intended railway from Yunnanfu to Laokai, and by Russia to an extent as yet perhaps not accurately known in Manchuria. But these also, whatever may be their effect as stepping-stones, cannot in themselves be classed as even minor territorial rights.

Asserted Spheres of Influence by Rudimentary Relations with Natives.

The eminent Portuguese jurist and statesman Martens-Ferrão defended the claims of his country during the difference with England as to their African possessions and interests which was ended by the convention of 11 June 1891, on a ground which may be noticed here in connection with spheres of influence, although it might also have found a place in relation to modes of acquiring sovereignty in new countries.

M. Martens-Ferrão teaches the sound doctrine that international title to territory cannot be based on "cessions made by native chiefs, half or wholly savage, to the chance comer who gives them the most," because they do not themselves "possess any constituted sovereignty, that being a political right derived from civilisation." Consequently after mentioning, first, *dominium* joined with *imperium*, and secondly, holding states in vassalage, as two of the forms of Portugal's colonial right,

[1] See above, p. 42.

he places the third form which he claims for her on the following ground. "She has also countries with which she has established *rudimentary relations*, founded on the right of first discovery, never abandoned and preserved in this manner. With all these tribes Portugal has always maintained relations by the *rudimentary commerce* of which alone these peoples are capable.... The last form is recognised by public law, and will long continue to be so, in the great and uncertain enterprise of calling to civilisation tribes which at present are still either in the lowest state of decadence of the species or in the most rudimentary infancy." It will be observed that the learned writer, by contrasting the claim which he puts forward with *imperium*, avoids confounding it with the ancient claim by discovery without effective occupation. He is rather to be understood as asserting an exclusive sphere of influence founded on contact and commerce, at least when those advantages are enjoyed by the nation which made the discovery, and conferring a territorial right less than sovereignty, more or less like that resulting from a colonial protectorate or that sometimes considered to result from an agreement for reciprocal abstention from colonial expansion. But this shows on the one hand how jealously the modern notions of rights short of legal sovereignty must be restricted to an inchoate character, if they are not to constitute a relapse into views long ago exploded, and on the other hand how necessary the admission of inchoate rights is to meet political exigencies[1].

[1] See *L'Afrique: la question soulevée dernièrement entre l'Angleterre et le Portugal considérée au point de vue du droit international, par J. B. de Martens-Ferrão.* This essay appeared in 1890 in the *Archives Diplomatiques* as well as separately at Rome and at Lisbon. The passages here referred to are at pp. 9, 10 of the pamphlet with the imprint of Rome.

CHAPTER VII.

RIVERS.

Rivers as Boundaries of States.

When a river forms the boundary between two states it is usual to say that the true line of demarcation is the *thalweg*[1], a German word meaning literally the "downway," that is the course taken by boats going down stream, which again is that of the strongest current, the slack current being left for the convenience of ascending boats. It is said that the *thalweg* was first proposed for this purpose at the congress of Rastatt; the older authorities had generally taken the middle line of the river as the true boundary in obedience to the rule of Roman law for the delimitation of properties, which had the inconvenience that as a river falls according to the season a larger space may become uncovered on one side than on the other, and so the middle line of the water may shift[2]. If the river divides into channels or branches, the rule of the *thalweg* points out the branch which is to furnish the boundary, and the islands on either side of that branch belong to the one or the other state

[1] *Thal* in the sense of valley enters into *thalweg* only indirectly. The immediate origin of the word lies in the use of *berg* and *thal* to express the upward and downward directions on a stream, like *amont* and *aval* in French.

[2] Carathéodory, in Holtzendorff, vol. 2, p. 304, note 6. The congress of Rastatt did not end in any treaty, but we presume that the reference is to the French note of 19 July 1798, in which the French negotiators gave up the demand for the whole of the islands in the Rhine and proposed the *thalweg* for the partition of the river. Schoell, *Histoire abrégée des Traités de Paix*, 1re partie, c. 27.

accordingly[1]. In the selected branch, or in the entire river if undivided, signal-posts or other marks are often set up in order to indicate the *thalweg* by marking the line of greatest depth, which is assumed to coincide with it[2]. If this is not done, it will probably be necessary in many cases to fall back on the old rule of the middle line of the water, whether the entire river or a branch. But the whole of this paragraph must be understood as subject to the possibility that a particular river boundary between two states may have been specially arranged by treaty or by undisputed possession. In such cases not only may the islands in the river be divided differently from the result which the general rules would give, but even the whole river may lie in one of the states, the frontier of the other following the shore. Thus by immemorial possession Hamburg has the Elbe and Bremen the Weser for their whole width from the respective city to the mouth of the river, and by the peace of Westphalia Sweden had the whole width of the Oder[3].

The changes in territorial limits which may result from changes in the bed of a boundary river, and the sovereignty over islands newly arising in such a river, are subjects on which the international jurists of the continent naturally have much to say. They are not of great interest to the people of the British isles, and we content ourselves with referring in a note to some of the best and fullest authorities[4].

International Rivers.

An international river is a navigable river which flows through the territories of two or more states, as the Rhine flows from Switzerland into Germany and thence into the Netherlands, or which forms the boundary between states, as the Danube between Rumania on the one side and Servia

[1] It will appear from the last note that it was with a view to the partition of islands that the rule was introduced.

[2] Carathéodory, in Holtzendorff, u. s., p. 303.

[3] Geffcken's note 3 to Heffter, p. 173.

[4] See Holtzendorff, vol. 2, § 56, pp. 266–8; 1 Rivier, 179; Calvo, § 294. The increase of territory through a change in the bed of a stream is called *accession* in French, and that term is adopted in German; the English term is accretion.

and Bulgaria, or Turkey the suzerain of Bulgaria, on the other side. In the middle ages and long afterwards the trade and navigation on such rivers was cruelly hindered by the arbitrary dues exacted by the riparian powers and the arbitrary regulations imposed by them. The vehement outcry against such a condition of things was placed by Grotius on the ground of an appeal to reason. After describing according to the views then prevalent about prehistoric times how an original system of community had been replaced by one of private property, and showing how the rights which so arose are controlled by necessity, he mentions as a source of further restriction on property the advantage which may accrue to one party without harm to the other party, and gives the following example.

"So whatever land, rivers or parts of the sea have become the property of any people ought to lie open to passage by those who have need of it for just causes, as if being expelled from their own country they are seeking vacant land, or desire to trade with a nation not contiguous to them, or even if they are claiming redress by just war. The reason here is the same as above [in the case of necessity], namely that it was possible for property to be introduced concurrently with the admission of such modes of using things as are profitable to the one and do not hurt the others, and therefore the founders of property must rather be considered to have intended this..... But it is asked whether he who has the sovereignty in the soil can impose dues on merchandise thus passing, whether by land, river or such part of the sea as can be called an appendage of the land. Certainly no equity allows any burdens to be imposed on that merchandise which have no reference to it. So also a capitation tax imposed on citizens for meeting the burdens of the commonwealth cannot be exacted from foreigners passing through the country. But if expenses are incurred for the security of the merchandise, or even for that among other objects, they may be compensated by dues imposed on the merchandise so long as the measure of them does not exceed their cause[1]."

[1] *De Jure Belli ac Pacis*, l. 2, c. 2, §§ 13, 14. The doctrine of Vattel is similar. Speaking of lords who establish a toll on a river without spending a penny on the maintenance of the navigation, he says: *le partage et la propriété des terres n'a pu ôter à personne le droit de passage, lorsqu'on ne nuit en aucune façon à celui sur le territoire de qui on passe. Tout homme tient ce droit de la nature, et on ne peut avec justice le lui faire acheter.* Liv. 1, § 104. Again: *le droit de passage est encore un reste de la communion primitive, dans laquelle la terre entière était commune aux hommes et l'accès libre partout à chacun suivant ses besoins. Personne ne peut être entièrement privé de ce droit, mais l'exercice en est restreint par*

That the principle on which the freedom of trade and navigation is thus claimed on international rivers does not include the rivers which are entirely comprised within the territory of a single state, as asserted by Bluntschli[1], appears from the condition that those who use the right of passage must have need of it for just causes. It is common for states to reserve their coasting trade for their own nationals and to prohibit the importation of foreign merchandise in ships of third countries, and no question is ever raised as to the international lawfulness of such restrictions. But a state can no more be bound to open its river ports than its seaports to foreigners. It is only when a state on an international river and an oversea state, or two states on the same international river not contiguous to one another, are desirous of such intercourse, that the vessels of either have a just cause for needing passage through the coriparian territories lower on the river in the one case or separating them in the other case, and that the doctrine of Grotius applies. The test for its application is that the navigation in question has a lawful territorial origin, and a lawful ulterior destination beyond the part of the river through which the passage is claimed. The principle asserts the free use of rivers as the vehicle of intercourse not in itself affecting the country of passage, and nothing more.

Hence it follows that his own principle, applied as we must

l'introduction du domaine et de la propriété. Liv. 2, § 123. The system which Vattel builds on this foundation is that in order to claim the right of passage you must have a necessity for it, in which there can be little doubt that he would have included the desire to trade with a distant nation which Grotius expressly mentions, for, after exemplifying necessity by the inability otherwise to procure the means of living, he adds *ou de satisfaire à quelque autre obligation raisonnable,* and he had maintained (l. 1, § 21) that *une nation doit se perfectionner, elle et son état.* But the territorial sovereign is the judge whether an equal necessity does not prevent him from granting your claim. Only (l. 2, § 129), if the use of his territory which you claim to make would evidently cause him no damage, his refusal will be an injury; and if he gives no reason, which we shall not be wrong in interpreting as no reason which you regard as reasonably sufficient, you may consider him as an enemy and act towards him as prudence dictates. Thus the territorial sovereign is not really allowed much discretion.

[1] *Droit International Codifié,* § 314.

now apply it, cuts out a part of the doctrine which, not inaccurately as international law then stood, was held by Grotius to follow from it. The ideas of neutrality entertained in his age allowed a lawful ulterior destination to be furnished by the purpose of carrying on a just war in the region to be reached by the passage claimed. But now that a neutral may not concede transit to the armed forces of any belligerent, be his cause just or unjust, a hostile destination to an enemy's country affects the country of passage in the very serious point of the performance of its neutral duties, and it is agreed that the rights on international rivers do not extend to ships on an errand of war.

Very soon after the publication of the great work of Grotius, Art. 14 of the treaty by which Spain in 1648 acknowledged the independence of the United Netherlands closed the Scheldt on the side of the latter, a measure which was maintained against Austria in 1713 when the Spanish Netherlands were ceded to her by the treaty of Utrecht, and from which in 1784 the emperor Joseph II vainly attempted to free his states. Thus communication with oversea countries, whether under the Spanish or Austrian or under a foreign flag, was denied to the provinces now forming part of Belgium[1]. And for nearly two centuries the tendency, both of thought and of action, was to support the principle of Grotius only so far as it operated in favour of riparians, and to give to the latter not merely the right of passage but also that of sharing in the river traffic commencing or terminating at one another's ports. In Roman law navigable rivers were public, that is they belonged to the state for the general good of its subjects, and as this doctrine was applied to the shadowy state unity of Germany, the result lay in the direction of a free common use of German rivers by Germans but not by outsiders, though even that narrower aim was far from being practically realised[2]. Then the wars of the

[1] The Dutch argued that the channels by which the waters of the Scheldt reach the sea across their territory were made navigable only by their industry and expenditure, and ought therefore to be regarded as artificial communications and not as natural river courses.

[2] See the piece on the international law of rivers in the 2nd volume of Holtzendorff's *Handbuch des Völkerrechts*, which is by Carathéodory,

French revolution and empire produced many territorial changes embodied in treaties dealing with the rivers affected by them, and in these the freedom of the river navigation for the coriparians was repeatedly affirmed. Thus the practice seemed to be assuming the shape of what has been called a *condominium* of the coriparians, in favour of which the legal argument was enforced by that from the reciprocity which it established between them mutually, while excluding those who, being external to the river, would not be on a reciprocal footing with the riparians.

But the very denial of the Grotian principle by the closure of the Scheldt provoked the reaction which was to give that principle a currency which it had not before attained. By a decree of the French convention, 16 November 1792, the Scheldt was declared open because "a nation cannot without injustice pretend to the right of exclusively occupying the channel of a river, and hinder the neighbouring peoples who border on its higher shores from enjoying the same advantage." Thus the Scheldt was opened, and as it proved finally, in pursuance of a doctrine which would give to a riparian state the right of free communication with oversea states, under their flags if it chooses to receive them as well as under its own flag. And on the fall of Napoleon the allied sovereigns placed themselves in line with the more advanced opinion, declaring, by Art. 5 of the treaties of Paris in 1814, that "the navigation on the Rhine, from the point at which it becomes navigable to the sea and reciprocally, shall be free, so that it cannot be prohibited to any one"; also that "it shall be examined and decided in the forthcoming congress how, in order to facilitate communication between peoples and render them continually less strange to one another, the preceding disposition may be equally extended to all rivers which in their navigable course separate or traverse different states." The congress of Vienna

who (p. 292) quotes from the capitulation on the election of Francis II "also no exclusive right of navigation" (Art. 7, §§ 1, 3), and "that ships may pass up and down unhindered, and that one Order may not less than another avail itself according to right and equity of the magnificent opportunities provided by God and the benefits conferred by nature herself" (Art. 8, §§ 6, 7).

however fell a little short of this promise. By Art. 108 of its Act the coriparian powers of each river engaged to regulate every thing relating to its navigation by their common agreement, taking for base the principles laid down in the following articles; and by Art. 109 it was declared that the navigation on each river, from the point where it becomes navigable to its mouth, shall be entirely free, and cannot in respect of commerce be prohibited to any one. A comparison of this language with that which had been used the year before shows the substitution of the phrase "to its mouth" for "to the sea," the introduction of the phrase "in respect of commerce," which at first sight might seem to mark a contrast with the passage of ships destined for war but which might also serve to contrast commerce with navigation, and the reference of the whole to regulations to be laid down by the coriparians without the intervention of outside powers. The wording seems to have been skilfully chosen in order to mask a retreat, intended by some members of the congress, to the ground of *condominium*[1].

[1] The special articles with regard to the Rhine which were annexed to the Act of the congress of Vienna provided for the free navigation of that river *jusqu'à la mer*, but only *sous le rapport du commerce*; and the minutes of 3 March 1815 record that the other members of the commission saw no reason for adopting an amendment of those articles proposed by Lord Clancarty, because the wording adopted *ne semblait pas s'éloigner des dispositions du traité de Paris, qui ne visaient qu'à débarrasser la navigation des entraves qu'un conflit entre les états riverains pouvait faire naître, et non de donner à tout sujet d'état non-riverain un droit de navigation égal à celui des sujets des états riverains, et pour lequel il n'y aurait aucune réciprocité*. There was no substantial difference between the wording adopted and that proposed by Lord Clancarty except that the latter would have declared the Rhine free *au commerce et à la navigation de toutes les nations*, so the majority of the commission would seem to have relied on the omission of freedom of navigation, as distinguished from freedom of commerce, for preventing the articles as to the Rhine from securing the complete liberty of oversea traffic, notwithstanding the use in them of the wording *jusqu'à la mer*. In that case they must have put a similarly restrictive interpretation on the words *sous le rapport du commerce*, where they are used in Art. 109 of the Act for defining the general doctrine; and M. Engelhardt, in his article on *La Liberté de la Navigation fluviale* in the *Revue de D. I. et de L. C.*, t. 11, while combating the restriction, admits it to follow from the minute that it was intended by the words in question to exclude foreign flags: p. 365. But this will not explain the

During the forty years which succeeded the congress of Vienna the navigation on European international rivers continued to be regulated by conventions of the coriparian powers which in general did not admit the foreign or oversea flag. Such were the conventions of the German powers as to the Elbe (1821), the Weser (1823) and the Ems (1843), and the Austro-Russian convention (1818) as to the Vistula, the Dniester and the Pruth. The Act of 1831 as to the Rhine was so stringent that Prussian vessels, commanded and manned by Prussians, could not carry on direct intercourse between the Prussian ports on the Baltic, as Stettin, and on the Rhine, as Cologne[1]. But the conventions as to the Po (1849, between Austria, Parma and Modena; 1850, accession of the Pope; 1851, Austria and Sardinia) admitted the universal equality of flags, and so did the arrangement as to the Scheldt, the opening of which would otherwise have been of small advantage to Antwerp. On the other hand the convention as to the Elbe did not admit even the coriparians to the river traffic commencing and terminating in the same state, only to that between river ports in different states.

The congress of Paris in 1856, dealing with the Danube, brought on the scene a river in the navigation on which the interests of oversea powers bore a greater ratio to those of the

reference in the minute to the treaty of Paris, for the words *sous le rapport du commerce* do not occur there. In giving a restrictive interpretation of that treaty the majority probably betrayed the fact that, in the mean time, they had recovered the courage necessary for resisting the wave of opinion which in the first enthusiasm attending the victory of the allies had carried them away; and they may have been prompted by that change of their attitude to substitute *jusqu'à son embouchure* for *jusqu'à la mer*, in the general provisions though not in those for the Rhine. The article by M. Engelhardt here referred to forms a chapter in his work *Du régime conventionnel des fleuves internationaux*.

[1] See the article by M. Engelhardt referred to in the last note, of which much use has been made in this chapter, p. 366. The learned author says, p. 374, that the coasting traffic is not prohibited to outsiders on the lower course (*le parcours inférieur*) of any conventional river, and he quotes as examples the Elbe between Hamburg and Cuxhaven, the Weser between Bremen and Bremerhafen, and the Dutch part of the Rhine. This makes an exception to the statements which we have borrowed in the text.

riparians than had been the case in any previous instance, and the treaty which resulted provided as follows.

"Art. XV. The Act of the Congress of Vienna having established the principles intended to regulate the navigation of rivers which separate or traverse different states, the contracting powers stipulate among themselves that those principles shall in future be equally applied to the Danube and its mouths. They declare that this arrangement henceforth forms a part of the public law of Europe, and take it under their guarantee. The navigation of the Danube cannot be subjected to any impediment or charge not expressly provided for by the stipulations contained in the following articles: in consequence there shall not be levied any toll founded solely upon the fact of the navigation of the river, nor any duty upon the goods which may be on board of vessels. The regulations of police and of quarantine to be established for the safety of the states separated or traversed by that river shall be so framed as to facilitate as much as possible the passage of vessels. With the exception of such regulations, no obstacle whatever shall be opposed to free navigation."

Provision was made for the execution by the joint action of the great powers of the necessary works for clearing the access to the Danube from the Black Sea, and a commission of the riparian powers appointed by the treaty drew up regulations dated 7 November 1857, by which the navigation between the sea and all river ports was to be open, in either direction, for the flags of all nations, but the traffic between river ports was to be open for all the coriparians and for them only. This certainly did not correspond with the express declaration of the treaty that no obstacle whatever should be opposed to free navigation except for police and quarantine, and the regulations were consequently disallowed by the great powers assembled in conference at Paris in 1858, the powers expressing characteristic opinions on the possibility of justifying the conclusions of the commission by the reference which the treaty had made to the Act of the congress of Vienna. Austria-Hungary, interested as a riparian, defended the regulations as consistent with the minutes of 3 March 1815. Prussia, interested as a riparian in the German rivers of the north but not in the Danube, agreed in the interpretation of the Act of Vienna but held that the treaty of Paris had applied a more liberal system to the Danube. England, true to the view she took in 1815[1], rejected the restrictive

[1] See note, p. 147, for the amendment proposed in 1815 by Lord Clancarty.

interpretation of the Act of Vienna. France also rejected that interpretation, observing that any doubt which could exist about it was set at rest by the primitive and fundamental disposition of the treaty of 1814, which bore in substance that the navigation on the Rhine and on all other international rivers should be free, so that it cannot be prohibited to any one. In the result, the lower Danube is open to the foreign or oversea flag as far as the seagoing vessels which in fact navigate it can ascend, without any restriction of the traffic in which they may engage, and on the whole of the river the traffic between river ports, whether of the same or of different states, is open to all the coriparians. What has been thus stated as to the Danube is also the actual condition of the Rhine, except that under the convention of 1868 the admission of the foreign flag is practically qualified by the necessity of the vessel being certified as fit for the river navigation, and of her being piloted by a person domiciled in one of the riparian states and certified by it. But there had been points in the history of the Rhine which require special mention. After the separation from that river of the Waal and the Leck, which join the different branches of the Meuse and lose their names in those of the latter and of the channels connected with it, the stream which continues the name of the Rhine is insignificant, and the passage from it to the sea and inversely is intercepted by the sluices at Katwyk. It was therefore agreed, first that the Leck, and afterwards that the Waal, should be substituted for the nominal Rhine in respect of international navigation, Holland representing this as an act of grace since, according to her, the conventions only applied to the latter. And even on the Waal she closed the international navigation at Gorcum, where the tide begins and the name of Waal ceases, which she said satisfied the words *jusqu'à la mer*. But both the outside and the riparian powers contended that those words meant "into" and not merely "as far as" the sea, an interpretation which the conventions for the Elbe and the Weser had already adopted by saying *bis in die offene See*, and that the stipulations as to the Rhine could only be satisfied by the freedom of the real outlets of its water. By the convention of Mayence in 1831 Holland conceded the freedom of the mouths leading by Helvoetsluis and

Briel to the Waal and the Leck, and undertook, in case of their becoming obstructed, to open for the international navigation passages as convenient as those which should be used by her own subjects.

Passing from Europe to America, we may first notice that in the treaty of 1783, by which Great Britain acknowledged the independence of the United States, the right to navigate the Mississippi in that part of its waters which belonged to the latter was secured to British subjects, but that that stipulation was not repeated in the Anglo-American treaty of 1815. At the former date the Mississippi was erroneously believed to rise in the territory which remained British, and even otherwise it fulfilled the geographical conditions of an international river, Spain being already the sovereign of its mouth on one side, and by the arrangements of 1783 becoming such on the other side also; though it is probable that the position of Spain at the mouth would not alone have dictated the stipulation, since, had the true source been known, England would have been seen to be an outsider to the navigation. By the latter date the river was known to lie entirely in the territory of the United States, which had acquired its mouth. The international rights in its navigation, whether founded on mistaken geography or on real conditions, lapsed with the mistake or the conditions, and a river being and known to be comprised within a single state could not be treated in an exceptional manner on account of its past history. So also the Po, since it became exclusively Italian in geography through the acquisition of Venice by Italy, has been subject in its navigation to no rights but those of Italy[1].

On the Mississippi while Spain possessed its mouth and claimed the western bank of its higher course, and on the St Lawrence of which the lower course lies in a British posses-

[1] Fiore (vol. 2, pp. 63, 64), Rivier (vol. 2, p. 228), and perhaps Carathéodory (2 Holtzendorff 303) though his words may admit of a less extensive interpretation, maintain that territorial changes transforming an international river into one comprised within a single state have no effect on the liberty established upon it for different flags during its international existence. They quote the treaty of Zurich, by which Austria ceded the Milanese but the conventions as to the Po were maintained. But Austria continued to possess a part of the Po until her cession of Venice.

sion, the question of international rivers presented itself to the United States as against Spain and England in circumstances differing in some respects from those which had attended the European controversies. No common use of the river by coriparians, however restricted, had been growing up, as in the dominions which acknowledged the Holy Roman Empire or on the frontiers of that empire and France; no appeal to the Roman law by which rivers were in the public domain of the state would have had any meaning. There was nothing to lead the thoughts to a *condominium* in which the right of navigation on each part of the stream as well as the appropriate regulations for it should depend on a vote of the coriparians of the whole. The claim made was simply that of Grotius and Vattel to innocent passage through the territory of another state, and was supported as by them on philosophical grounds concerning the original constitution of sovereignty, a little qualified in statement by the absence of any state other than the coriparians which might have an interest such as the maritime powers of Europe have in the greater rivers of that quarter of the globe although not bordering on them. The United States contended that the freedom of the ocean to all men and of rivers to all the riparian inhabitants was a sentiment written in deep characters on the heart of man; that the authority of this natural law was augmented by the fact that when the inhabitants of the lower part of a river excluded those of the upper part from its navigation, this was only the triumph of the strong over the weak, and was condemned as such by society in general. It was true that the right claimed was an imperfect one, because its exercise must be dependent to a considerable degree on the conveniency of the nation through which persons using it were to pass, but if it were refused, or so shackled by regulations not necessary for the peace or safety of the inhabitants as to render its use impracticable, an injury would be inflicted for which it would be proper to exact redress[1].

[1] See Jefferson's *Instructions to the Ministers of the United States in Spain,* Waite's *State Papers,* vol. 10, p. 135 &c.; and *British and Foreign State Papers,* 1830–1, pp. 1067–75. The arguments are summarised by Wheaton, *History of International Law,* 4th period, § 21, and by Hall, § 39.

As this is the first occasion on which we have met with the class of imperfect rights, it will be well to pause and consider it. Within a state, legislation is largely occupied with giving effect to claims to ignore which it is felt would be a violation of attributive justice, yet which would cause great inconvenience if their assertion was not fenced by definition and limitation. But it is unnecessary to notice those claims in their original undefined and unlimited condition, because the legislator is on the spot, ready to supply whatever precision is required. An illustration is furnished by the claims of inventors and authors, which are recognised by the laws of patent and copyright so far as is deemed compatible with the general good, and cannot be entertained any further by the courts of justice. Thus the distinction between moral and legal rights is well marked, even when the former depend on that particular virtue, justice, which is most intimately connected with law. But since in the society of states there is no legislature beyond the very imperfect one of custom and agreement, which may establish principles but is little fitted to define practical details, much injustice would be done if rights not clothed with all the precision desirable for action on them were dismissed as summarily as they are dismissed by the internal law of a state. It is necessary to introduce a class of imperfect rights between those which are merely moral and those which are perfectly legal.

Besides the navigation of international rivers, the extradition of criminals may be taken as in point. As we have said elsewhere: "Doctrine may lay down that extradition ought to be granted only for grave crimes, but it cannot determine precisely for what crimes. It may lay down that a *prima facie* case ought to be made out against the person accused, but not precisely what evidence not satisfying the usual requirements of the court ought to be received from abroad for that purpose.... Doctrine may lay down that a state ought not to bar the peaceful passage across its territory along a river, or hamper it by customs duties, but it cannot determine the measure in which those who use the passage ought to contribute to the cost of maintaining the navigation, or the regulations to which they ought to be subject for the security of the state across which they pass. Therefore extradition and the peaceful navi-

gation of international rivers must be imperfect rights in the sense that conventions are indispensable to their due enjoyment. But it does not follow that there is in them no element of law....If a state persistently refused to conclude proper conventions for extradition or to surrender fugitive criminals without them, it is not to be supposed that other states would put up for ever with its being an Alsatia, rendering due repression of crime within their own limits impossible. Nor is it to be supposed that states desiring commerce with one another... would feel themselves bound to forego it for ever because a state across the territory of which it was necessary to pass along a navigable river was persistently churlish[1]." Reserving until we have completed the history a final answer, such as assumed in the last words, to the question whether a right of the kind can be claimed as already established on international rivers, sufficient reason seems to have been shown for the admission in the society of states of a class of imperfect rights, to which the element of law is contributed by the support which powers taking in extreme cases their remedy in their own hands would receive from that society, so that the true description of the rights in question is imperfect legal rights.

The American argument therefore appears to us to have been well founded. The answers made to it, which so far as England was concerned were inconsistent with the stipulations to which her supposed possession of the upper Mississippi led in 1783, were based in substance on the rejection for practical purposes, between states as well as before the internal courts of a state, of natural law or attributive justice, and of the doctrine of imperfect international rights which springs out of it. Rights on international rivers were derogations from territorial sovereignty, and were not merely shaped by international conventions but drew their origin from them. The fundamental constitution of sovereignty contained no exception for innocent passage on rivers, and the United States' claim to navigate the lower St Lawrence was no better founded than would be a Canadian claim to carry goods to the Mississippi, the Ohio or

[1] *Chapters on the Principles of International Law*, pp. 74, 75.

the Hudson, either by land or by the canals in the United States, and thence down those rivers to the sea[1].

In the result, Spain, by the treaty of San Lorenzo el Real in 1795, opened the navigation of the Mississippi to citizens of the United States, reserving the right to extend it to other powers. And after various changes in the conventional situation the Anglo-American treaty of Washington in 1871 secured the usual international rights of navigation not only in the St Lawrence but also in the Yukon, Porcupine and Stikine rivers and in the St Clair Flats canal, while England undertook to urge on the dominion of Canada, and the United States to urge on the several states of the Union, that they should secure to the opposite party the use on terms of equality of the other canals connected with the navigation of the St Lawrence.

On the South American rivers, mainly in consequence of the great commercial interests of England, France and the United States, the flags of all nations and not merely those of the coriparians have been admitted[2].

By the General Act of the African Conference of Berlin of 1885 it is provided:

"Art. 2. All flags, without distinction of nationality, shall have free access to the whole of the coast-line of the territories above enumerated, to the rivers there running into the sea, to all the waters of the Congo and its affluents, including the lakes, and to all the parts situate on the banks of those waters, as well as to all canals which may in future be constructed with intent to unite the watercourses or lakes within the entire area of the territories described in Article 1. Those trading under such flags may engage in all sorts of transport and carry on the coasting trade by sea and river, as well as boat traffic, on the same footing as if they were subjects.

"Art. 3....All differential dues on vessels as well as on merchandise are forbidden."

The territories to which the articles here quoted apply are those constituted by Art. 1 as a region of free trade, subject to a discretion which the same article reserved to powers already owning territory in a portion of that region; and this leads us to

[1] *British Paper on the Navigation of the St Lawrence;* Congress Documents, no. 43.

[2] For the treaties and the emperor of Brazil's decree of 1867 see Calvo, §§ 280–289.

an important utterance of Lord Salisbury with regard to the rights on international rivers. In 1888 the British settlements on the Shire, an affluent of the Zambezi, were in danger from Arab slave raiders, and the British government asked Portugal, to which the lower part of the Zambezi was agreed to belong, to permit its subjects, but not the Arabs, to receive munitions of war by way of the rivers. Portugal, which at the time was in an acute state of rivalry with England as to the region in question, claiming for herself the soil of the British settlements on the Shire, prohibited the passage of munitions of war both to them and to the Arabs. There was no doubt that the rivers, so far as properly Portuguese, were included in the discretion above referred to as reserved by the conference, but there was a question whether Portugal had not engaged herself to exercise that discretion in favour of the freedom of navigation on them. In those circumstances Lord Salisbury on 25 June 1888 addressed a despatch to Mr Petre, the British minister at Lisbon, in which he said: "but even if she [Portugal] had given no such pledge, this country could not admit her right to inaugurate a system which would practically result in the exclusion from the waters over which she has control of all British ships wishing to pass beyond those waters. Sir J. Fergusson's remarks in the House of Commons were in this sense, and I should wish you to state to Senhor Barros Gomes that they accurately expressed the views of Her Majesty's government[1]."

This pronouncement must be read in connection with the fact that a convention as preliminary to the international use of a river, important as it certainly is for preventing the abuses likely to attend unregulated navigation through a populous country, could be little needed in the case of so wild and thinly peopled a region as that of the lower Zambezi. So read, the pronouncement ranks the British government in line with the doctrine of Vattel as applied to rivers not confined to a single national territory, and with the United States' argument on the North American rivers, both treating the right of innocent passage along them as a real one, and in the case of necessity to be used on the responsibility of the state asserting

[1] *Parliamentary Paper* c. 5904, p. 43.

it, although normally to be completed by agreement with the territorial sovereign; in other words, an imperfect right.

We may now look back on the history which we have traced, and ask whether it does not amount to such an acceptance of that right by the civilised world as makes international law by the consent of states. We have seen the right carried into practical effect in Europe, America and Africa, by a series of conventions so numerous as to imply strongly that they rest on a common principle, and without limitation to the coriparians wherever the interest of outside powers has been sufficient to induce them to intervene. This was accompanied in 1814, 1815 and 1856 by expressions pointing to the general application to all rivers of the principle that was being applied to some rivers on the respective occasions; and if in 1815 there was hesitation on the part of some powers as to whether the principle included any but coriparians, the pronouncement of 1856, which included outside states in its benefit while citing that of 1815 as precedent and authority, and was followed up in 1858 by the rejection of narrower regulations, put for the future the larger construction on the Act of Vienna. In 1885 the principle was applied, and in its largest construction, to the acquisitions thenceforth to be made in a vast region, leaving to the powers already established within its limits an option naturally resulting from the fact that the mission of the conference was only to deal with parts still unoccupied. Lastly, the principle has taken a progressive hold: enjoyment has been claimed as an imperfect right by Great Britain, which once maintained that convention was its only origin. We conclude that a sufficient consent of states exists to warrant the assertion that a right of navigation, of which the best statement is that made for the Danube by the treaty of Paris in 1856[1], exists as an imperfect right on navigable rivers traversing or bounding the territories of more than one state[2].

[1] See above, p. 149.

[2] There were certain tolls on German rivers, granted by emperors of the Holy Roman Empire or by simple kings of Germany in the remote times when that country had not yet been broken up by an exaggerated feudalism, or believed to have been so granted because their origin was

In tabulating the opinions of accredited authors on the subject, the important distinction is between (A) Those who deny the right of innocent passage, referring the matter entirely to convention, and consequently allowing the territorial state to refuse the passage or to exact a price for it; with whom must be classed those who assert a duty on the part of the territorial state to allow the passage subject to a reasonable convention, but make that state the final judge of its duty; and (B) those who assert the right of innocent passage, of course normally to be regulated by convention, but so that a clearly wrongful refusal by the territorial state may be resented as an injury. Among the authorities in the respective classes the following may be mentioned, subject to some doubt as to one or two whose language does not lend itself easily to this classification.

(A)—Klüber, *Droit des Gens*, §§ 76, 135;
G. de Martens, *Précis*, § 84;
Heffter, § 77;
Calvo, §§ 291, 293;
F. de Martens, vol. 1, § 101;
Phillimore, vol. 1, § 160;
Twiss, *Law of Nations* (*Peace*), § 145;

Hall, § 39.

lost in antiquity. Some of these existed down to a time later than 1815, and the reader who may meet with them in the midst of the international history of the rivers in question must be cautioned against supposing that they are inconsistent with that history as traced in the text. They were proprietary rights acquired under an authority which at the date of their inception was a national one, and, as such, had survived to times when the relations of the rivers on which they were levied and of the surrounding territories had become international; as anachronisms, they had to be suppressed with compensation. The most remarkable instance was that of the Stade or Brunshausen toll, levied on the Elbe below Hamburg, from which the Hamburgers obtained an exemption in 1189, confirmed in 1268, but which continued as against others and became vested in the king of Hanover. It was regulated in 1843 by a convention of the coriparians of the Elbe, and suppressed in 1861 for compensation, by a general European treaty and a treaty between Hanover and the United States. See Twiss, *Law of Nations* (*Peace*), § 156.

(B)—Grotius, l. 2, c. 2, § 13;
Pufendorff, l. 3, c. 3, n. 5–8;
Vattel, l. 2, § 130;
Bluntschli, *Droit International Codifié*, § 314;
Geffcken, on Heffter § 77—"free passage to all, but at least to all coriparians";
Engelhardt, *R. de D. I. et de L. C.*, t. 11, p. 372;
Carathéodory, in Holtzendorff's *Handbuch des Völkerrechts*, vol. 2, § 60;
Fiore, § 794;
Rivier, t. 1, p. 226;
Despagnet, § 428;
Ullmann, § 94;
Institute of International Law, Heidelberg resolutions, *Annuaire* 1887–8, p. 182;
Wheaton, *Elements*, § 193.

It remains to notice a point on the navigation of international rivers about which there is universal agreement wherever the right itself is admitted to exist, and for the statement of which Wheaton's words may conveniently be borrowed. "It seems that this right draws after it the incidental right of using all the means which are necessary to the secure enjoyment of the principal right itself. Thus the Roman law, which considered navigable rivers as public or common property, declared that the right to the use of the shores was incident to that of the water, and that the right to navigate a river involved the right to moor vessels to its banks, to lade and unlade cargoes, &c. The public jurists apply this principle of the Roman civil law to the same case between nations, and infer the right to use the adjacent land for these purposes, as means necessary for the attainment of the end for which the free navigation of the water is permitted[1]."

[1] *Elements of International Law*, § 194.

CHAPTER VIII.

THE SEA.

The Open Sea.

We shall have to speak in their place of certain portions of the sea more or less nearly adjoining the land which are deemed to be comprised in the sovereignty over the land and are therefore called territorial seas. The rest of the waste of waters is called the open or high sea and no sovereign has any territorial right over it, in other words it is not the subject of sovereignty. A foundation has been sought for this in the Roman law, which declared the sea not to be the subject of private property but to be public[1]. The Roman lawyers however who laid this down were thinking of the relations between individuals and the one state which they had in contemplation, not of those between state and state. And if it were attempted to apply the argument by analogy to states, as individual members of the greater commonwealth, it would prove too much, since it would condemn the sovereignty over territorial seas no less than that over the open sea. The true foundation of the rule that the open sea is not the subject of sovereignty is the fact that it is not capable of occupation. The area over which a ship of war can exercise control from her momentary position is insignificant when compared with the vast expanse of the ocean, and her control even over that area is not permanent. The possession established by her ceases in fact as soon as she has left her station, and the power

[1] And this the Roman lawyers held to be in virtue of the *jus naturale* or *gentium*: Just. *Inst.* 2, 1, 1 and 5.

of reproducing it at the same station depends on too many contingencies to be that constant power to reproduce at will a possession which has ceased in fact, which is necessary to the continuance of the right[1]. It is because the physical power of occupation is immeasurably greater in the waters more or less nearly adjoining the land, where it is reinforced both by the works on the land and by the coastguard service which all maritime nations employ in those waters, that sovereignty is there admissible.

Nevertheless history is full of claims to sovereignty or dominion over the open sea, or to property in it, under which name we have seen that sovereignty often passed, or to rights over it which could have no foundation except in sovereignty. The claims of Spain to the Pacific ocean and the gulf of Mexico and of Portugal to all the Atlantic south of Morocco and to the Indian ocean, accompanied by prohibitions to all foreigners from navigating or enetring the respective waters, were the most outrageous of any, in respect both of their geographical extent and of their refusal even of innocent passage. They were repudiated and practically set at nought by the Elizabethan English and by the Dutch, and called forth the *Mare Liberum* of Grotius, to which Selden replied by the *Mare Clausum* in support of the much narrower but still extravagant pretensions of England. Venice claimed the northern part of the Adriatic, in which we may detect an application of the principle of gulfs, notwithstanding the width of the gulf in question and its not being wholly bordered by Venetian lands, and exacted a heavy toll from vessels navigating it, to which Bologna and Ancona were obliged to submit after resisting it by war. England exacted a humble salute to her flag from Cape Finisterre in Spain to Stadland in Norway, and obliged the Dutch to concede it in their treaties with her under the Commonwealth and

[1] See above, note on p. 94. The argument from the fluidity of water, which has sometimes been advanced to prove the sea incapable of occupation, is a poor one. The fluidity of the atmosphere would equally prove that sovereignty over land cannot extend *usque ad coelum*. The power to occupy a place is different from the power to prehend manually or to confine what is in the place.

Charles II, and she required foreigners intending to fish in the German ocean to take out English licenses, but she did not refuse or tax innocent passage, nor does that seem to have been done in any cases but those which have been mentioned[1]. Henry VII of England conceded the Danish claim to require licenses to be taken out for fishing in the sea between Norway and Iceland, and that claim was only dropped in the eighteenth century in consequence of the opposition of England and Holland to it. But the dues, substantial or honorary, which were paid by foreigners for the use of the appropriated seas in past times were compensated in some measure by the obligation to defend those seas against pirates which was generally understood to fall on the appropriators and was not as a rule neglected by them. On the other hand, two of the most remarkable claims over the open sea have been made since piracy has ceased to be a formidable evil. By the ukase of 1821, in order to protect the Russian settlements in America from disturbance and competition, the czar Alexander forbade foreign vessels to approach their coast within less than a hundred Italian or nautical miles; and in a note of 28 February 1822 M. Poletica, the Russian minister at Washington, asserted that his government might claim sovereignty over the whole of Behring's sea and the Pacific ocean between its Asiatic and American territories as a *mer fermée*, but "preferred only asserting its essential rights without taking any advantage of localities." The prohibition and the pretension to sovereignty were equally set aside by the Russian conventions of 1824 with the United States and 1825 with Great Britain, following the protests of both those countries. But the example of claiming the advantages of sovereignty without the odium of its name was not lost, and in 1889 the United States, which had purchased Russian America, legislated against killing any fur-bearing animal in so much of Behring's sea as lay on their side of the limit agreed on between them and Russia for the sovereignty over islands in it, as being hurtful to the sea fishery

[1] The case of the Sound dues belongs to the law of straits. Other examples of the appropriation of the open sea in past times are mentioned, with a good summary of the history, in Hall, § 40.

on their islands[1]. The attempt however was defeated by the arbitrators appointed under a treaty with Great Britain, who awarded in 1893 that "the United States have not any right of protection or property in the fur seals frequenting the islands of the United States in Behring's sea, when such seals are found outside the ordinary three miles limit."

The Legal Character of Ships.

But although pretensions to sovereignty over any part of the high sea are now obsolete, it would be an error to conclude that state sovereignty is not present at occurrences on the high sea and concerned in them. Those occurrences take place between or on board ships, each of which in the general rule belongs to a state of which she carries the flag, and is subject entirely and exclusively, so long as she is on the high sea, to the authority of that state, exercised by its ships of war as occasion requires, but regularly through the authority which even in the case of a merchantman is confided to her captain. The meeting of persons on the high sea has been compared to the meeting of travellers on land in a country where state sovereignty has not been established, but the comparison is misleading, or at least it can only hold if the land travellers on each side form part of a state expedition. Private travellers on land meet one another directly, and there is no state vehicle in the case. If one injures the other in a locality which does not belong to his state, his state is not responsible unless it has in some way made itself a party to the injury, and the injury is not done directly to the state of the other, although that state may intervene for the protection of its subject or the redress of his wrongs. Travellers at sea do not meet one another directly but ships meet, and any injury or usurpation of authority which either ship or any one on board her does or attempts to or over the other or any one on board her is done or attempted directly to or over the state which is represented in the latter by the authority which it has placed there, and

[1] The act of congress was "declared to include and apply to all the dominion of the United States in the waters of Behring sea," but this was understood and enforced by the government in the sense given in the text.

in most cases is done or attempted directly by the state authority on board the first ship. These truths are often expressed by saying that a ship, even a merchantman, is a floating part of the territory of her state, but that expression has the demerit of clothing in a fiction what can be conveyed with equal simplicity by stating the fact that a ship, no less than a territory, is a field of state action, state authority being present in her and on the high sea exclusive. Another fiction sometimes resorted to is that a ship, and her state by means of her, successively annexes by occupation the parts of the sea in which she floats from moment to moment. But this view has two faults besides the general objection to fictions. It does violence to the nature of occupation as a juridical act by attributing that character to any thing so fleeting as the momentary filling space in the course of a voyage, and it draws the attention away from the important point that state sovereignty is really present at an occurrence on the water, while fixing it on the unimportant question how far the locality of the occurrence can be likened to a spot on land. Such being the principles, it follows that action on the open or high sea by a ship belonging to one state or covered by its sovereignty, on or against a ship belonging to another state or covered by its sovereignty, is of the nature of intervention and is normally unlawful. But in the absence of local sovereignty it is only through systematised intervention that the high seas can escape being given up to anarchy, and it remains for us to see what rules on the subject have been established by reason, custom or treaties.

The Nationality of a Ship.

First, the nationality of a ship is that of the flag rightfully carried by her. If she is a public ship, that is if she is in the service of a state whether as a ship of war strictly so called, as a transport, or in any other capacity, and whether she is the property of that state or chartered by it, her flag is its military flag, and her right to carry it is vouched by the declaration of her commander and the production of his commission. In any other case her flag is the mercantile flag of her state, or some

special flag such as those granted to yacht squadrons, and her right to carry it is vouched by some public official document on board her, as the pass or sea letter, or the certificate of registry where the state keeps a register of shipping, a practice which began with England and is now common. The conditions on which different states admit ships to their register, or otherwise grant them the right to carry their mercantile flag, are very various, as that the ship shall have been built in their territory, or that she shall be owned in whole or in a certain proportion by nationals of the state or companies belonging to it, or that she shall be commanded and manned in whole or in a certain proportion by nationals of the state. But with such conditions international law has no concern: it suffices that, for whatever reasons, a state accepts the authority and responsibility which result from the ship's nationality. The responsibility can only be real if the ship belongs to a port of the state, on her return to which the captain, crew and passengers can be punished for any offences they may have committed at sea. Consequently an inland state cannot claim to have a mercantile flag entitled to international respect on the high seas, and Switzerland has not in fact made such a claim, although the federal council and federal assembly were of opinion in 1864 that a right to make it existed. But Swiss-owned steamers plying on the lakes between Swiss ports and French, German or Italian ports fly a Swiss flag, which is in accordance with principle, and the ships of all nations in the port of Nagasaki paid the usual respect to the Swiss flag hoisted by the Swiss envoy to Japan on his arrival there, which may be regarded as an international courtesy shown to the envoy[1]. If subjects of a state hoist its flag on a ship without its authority, or if they hoist no national flag at all, it may if it pleases protect them and accept the responsibility for their acts, but they have no claim on it, and they cannot as individuals claim any rights which belong to their state. During the civil war in the United States a Swiss citizen pretended that his ships under the Swiss flag were exempt from blockade by reason of the neutrality of Switzerland, an argument which would have been absurd even if that country had asserted the

[1] Twiss, *Law of Nations* (Peace), § 197.

right to a flag at sea, since to be neutralised is not to be privileged for blockade running, and the Swiss federal council declined to intervene on his behalf[1].

Visit and Search only a War right.

Where the flag of a state is rightfully carried by a ship on the high seas, the authority exercisable on board or over her, that is the right to give commands and use force in support of them, belongs exclusively to that state and is delegated by it to her captain or to its own superior officers afloat, with the two clear exceptions of war rights and self-defence, and a third perhaps doubtful exception for the case of pursuit lawfully commenced in territorial waters and continued in the open sea. To admit a conflict of authorities in any other case would be no less anarchical than to admit action by conflicting authorities at a spot on land. The war rights referred to are the absolute ones of an enemy, and the qualified ones allowed to belligerents as against neutrals for the purpose of enforcing blockades and preventing the carriage of contraband, formerly also for that of capturing enemy's property as such, including in each case the right of visiting and searching neutral ships for the purpose of detecting confiscable property and evidence in support of its confiscation.

These rights we shall have to consider in treating of war: here it is only necessary to say that they do not exist in time of peace, and that in time of war they are limited to the purposes which call them into being. Thus for the detection and suppression of the slave trade there is no right of visit and search by general law, but only by treaty between states which have conceded it to one another in their just hatred of that traffic, which, however abominable, has never been regarded as an international offence. It was practised by all the nations between whom international law arose, and the unhappy peoples who suffer from it do not belong to the relatively civilised ones between whom international duties are considered to exist[2].

[1] Twiss, u.s.

[2] See above, p. 91. See *Le Louis*, 2 Dodson 210, for a vigorous judgment of Lord Stowell to the effect that visit and search is exclusively a war right, and that the slave trade is not forbidden by international law.

Thus too the pretension formerly maintained by Great Britain, to take seamen whom she claimed as her subjects out of ships of foreign and friendly nationality, was abusive even when her officers boarded those ships in the exercise of the war right of visit and search.

Self-Defence on the open sea in time of Peace.

The other case in which on the high seas the flag clearly does not exclude the forcible exercise of authority on board by another state is that of self-defence, which arises when under cover of the flag a hostile enterprise is attempted against the state which intervenes. It is of no consequence how far the enterprise may be from its completion, if it is already in course of execution. Suppose for instance that a hostile landing is intended on a still distant coast of a friendly state: a ship of the latter, capable of defeating at once the unlawful voyage, cannot be expected only to follow the evil-doer into territorial waters, thereby giving him many chances of escape, or even of successfully carrying out the intended injury. Thus in 1873 the Spanish ship of war Tornado arrested on the high seas the Virginius, fraudulently registered in the United States as the property of a citizen but in fact belonging to Cuban insurgents, in support of whom she was on her way to Cuba, then belonging to Spain. The Virginius was brought into a port of the island in possession of the Spanish government, and there many United States citizens and some British subjects, found on board her, were shot without any other trial than by court martial. The British government, in demanding reparation for this treatment of its subjects, did not complain of the seizure of the Virginius, or of the detention of the passengers and crew. And this admission of the right of self-defence has been justified by the best authorities of the United States who have since written on the case[1]. But between the governments of that country and Spain the discussion proceeded on less satisfactory grounds. The latter inaccurately asserted that the capture had been made in its territorial waters, and, if that were not the case, pleaded the

[1] *The case of the Virginius considered with reference to the law of Self-Defence*, by George T. Curtis, and Woolsey, § 214, quoted by Taylor, § 406.

fraud by which the register of the former had been obtained. The attorney-general of the States very properly held that the arrest of the ship by a foreign power could not be justified on that ground, but, interpreting a protocol which had been signed as an agreement to admit it in principle, he decided on the facts that the Virginius was carrying the American flag without right, and the matter was amicably arranged. The nationality with which a ship has been invested by the authorities of a state must govern her treatment as a ship wherever that treatment depends on her nationality, as in a case of self-defence it does not, and if a foreign government thinks that in so investing her those authorities have been imposed on or have otherwise erred, to its damage, it must make its complaint to their state.

The doctrine here taught is not that which Dr Hannis Taylor quotes as follows from Mr Dana: "Nations having cause to arrest a vessel would go behind such [a fraudulent register] to ascertain the jurisdictional fact, which gives character to the document and not the document to the fact....The register of a foreign nation is not, and by the laws of nations is not, recognised as being a national voucher and guarantee of national character to all the world." Nor are we convinced by Dr Taylor's own adhesion to Mr Dana's view: he says that "the true doctrine is that a [fraudulent] register is only *prima facie* evidence of nationality, which any state may challenge at its peril when its interests are involved[1]." To maintain that view it would be necessary to show what is "the jurisdictional fact" which gives to a ship the nationality evidenced by its register or sea letter, if it is not the very grant of that document by public authority; and this it would be impossible to do in face of the great diversity of the conditions which different states exact for the enjoyment of their flag. If all the owners, the master and all the crew, are of one country, and the ship was also built in that country, a nationality may be assumed for her with a misleading facility. But what if a state to which all the owners, master and crew, as well as the country in which she was built, are foreign chooses for some end of its own to accept the

[1] § 405. Mr Dana is quoted from "a Boston Journal of January 6, 1874," a date which shows that he was writing with reference to the case of the Virginius.

responsibility for her: why can it not do so? And if it does so, what responsibility can lie on any other state for what its subjects have done outside its territory? It would be another question if a register were fraudulent in the sense of being forged, never having really been granted. Those sailing under it might then, no doubt, be treated as covered by no flag at all. But if the register is fraudulent in the sense of having been obtained by imposition on the authorities concerned, then the true remedy for any trouble which the ship may occasion surely lies in the principle of self-defence if the trouble is immediate, and as against more remote contingencies in appealing to the state of which the flag has been improperly obtained.

We have spoken in this section of the right of self-defence, and of hostile enterprise and immediate trouble as calling it into play. It remains to give this language as precise a meaning as it admits of. The employment between states of physical means (*voies de fait*) does not always stand on one and the same footing. If a physical injury is directed against the territory, property or acknowledged rights of a state or its subjects, physical prevention of it presents a true case of self-defence and is justifiable. Since international law does not provide the means of safeguarding the rights which it gives, it cannot be supposed that when it gives a right to a party who has the means of guarding it from violation it requires him to abstain from using those means. This will cover the case of the Virginius, on its way to effect a landing on Spanish soil in support of an insurrection. But when the interests involved in a right claimed but not acknowledged are subjected to physical damage, physically to oppose that damage is rather self-help than self-defence, and from the point of view of law cannot be tolerated. If in support of the claim all the resources of diplomacy, including arbitration and mediation where possible, have been exhausted, there may be sufficient ground for taking the matter up from the point of view of policy, and it is possible that it may even be submitted in good faith to the chances of war. So we may agree with the arbitrators in condemning the United States legislation, above referred to[1],

[1] See above, p. 162.

against killing furbearing animals in parts of Behring's sea which were not territorial waters, and the capture and condemnation of British ships in pursuance of that legislation, without necessarily denying that a claim for some protection of the seal herd in the high seas was reasonable, and in the due course of international procedure might have been ultimately maintained by physical means. The possibility that such protection of the seal herd might be necessary was recognised by Great Britain in the reference which was made to the arbitrators, to report such rules as they should deem to be proper for the purpose. But as soon as the United States failed, as they were bound to fail, in establishing a property in the seals found outside their territorial waters, it was apparent that the British ships which had been condemned had done no injury to a right but, at the utmost, damage to an interest, and that the violence done to their flag could not in law be justified.

Here we must notice something which Sir Charles Russell, afterwards Lord Russell of Killowen, said in the course of his very able argument, in answer to a suggestion made by the president of the court, M. de Courcel. The United States, he said, "would have a right to complain if it could be truly asserted that any class or set of men had, for the malicious purpose of injuring the lessees of the Pribilof Islands [belonging to the U.S.A.], and not in regard to their own profit and interest and in exercise of their own supposed rights, committed a series of acts injurious to the tenants of the Pribilof Islands. I agree that that would probably give a cause of action, and therefore they have the further right, what I might call the negative right, of being protected against malicious injury[1]." The reader needs but to think of the English cases on trade combinations in order to realise how slippery a ground of decision is furnished by malice, whether in respect of the difficulty of proving a motive, or in respect of allowing the motive, if proved, to give a right to a party who, if he had not been fortunate enough to have a malicious adversary, would only have had an interest. We may be sure that if it had been necessary to follow out a supposed state of fact so different

[1] *International Arbitrations of the United States*, by J. B. Moore, v. 1, p. 890.

from that which was before the court, the eminent advocate would have explained that, apart from physical interference with the property of the lessees or tenants, he meant only to speak of the aspect which malicious damage to an interest might assume in diplomacy, and not to admit that in law it could justify forcible interference with foreign shipping.

Another class of cases which presents the question whether self-defence is a justification for interfering with the foreign flag beyond the limits of territorial waters is that of the laws called hovering laws, by which many states—and England formerly among the number, though the British statutes of the kind have been repealed—for the prevention of smuggling or of illicit trade with colonies, prohibit vessels from transhipping goods or hovering within, most commonly, three or four leagues from their coast. Lord Stowell put such legislation on the ground that "maritime states have claimed a right of visitation and enquiry within those parts of the ocean adjoining to their shores, which the common courtesy of nations has for their common convenience allowed to be considered as parts of their dominions for various domestic purposes, and particularly for fiscal or defensive regulations more immediately affecting their safety and welfare[1]." But the mutual tolerance of the system, largely due to sympathy, and not brought by definite international transactions to any precise test whether of the purposes or of the distance for or within which the tolerance extended, can hardly be thought a sufficient legal foundation for such a superstructure. Chief Justice Marshall in the United States put it on the ground of a state's "power to secure itself from injury," analogous to "the right of a belligerent to search a neutral vessel on the high seas for contraband of war," adding that the means for preventing "any attempt to violate the laws made to protect this right...do not appear to be limited within any certain marked boundaries which remain the same at all times and in all situations[2]." But even if the law of contraband could be considered as based on principle and not as a compromise between belligerents and neutrals, the analogy would break down in that belligerents have no right to restrict by way

[1] In *The Louis*, 2 Dodson 245.

[2] *Church v. Hubbart*, 2 Cranch, 234, 235.

of precaution the navigation of vessels not carrying contraband. And the learned judge seems to have changed his opinion, as he said a little later that "the seizure of a person not a subject, or of a vessel not belonging to a subject, made on the high seas for the breach of a municipal regulation, is an act which the sovereign cannot authorise[1]." When we discuss on its merits the argument of self-defence as urged in favour of hovering laws, we must say that precaution, to which the case is reduced when those laws interfere with a ship not actually engaged in illicit trade, is not defence. "I will suggest," Sir Charles Russell said in the Behring's sea arbitration, "that the very idea of defensive regulation or defensive act, or self-preservative act, repels the idea of cut and dried, formulated rules[2]." If however the ship interfered with was really on her way to effect, or was engaged in facilitating for others, an illicit landing on the coast, it might be difficult to distinguish her case from that of the Virginius. Questioned by one of the arbitrators as to what the executive authority of a state would do if it had notice that a foreign ship was crossing the ocean for the purpose of violating its revenue laws, Sir Charles said that it "would probably do something before the vessel got within the three-mile limit, if it was proved to be necessary, relying upon the non-interference of the state to which that fraudulent vessel belonged not to make any complaint or raise any question whether the strict territorial limits had been exceeded[3]." He was attorney-general, and therefore, we may conjecture, did not speak without some knowledge of the practice. British acts of parliament require vessels liable to quarantine or having infectious diseases on board to observe certain regulations when within two leagues of the coast of the United Kingdom, but they authorise no enforcement of those regulations except by the recovery of a penalty from the captain when the vessel arrives within the territory.

[1] *Rose v. Himelly*, 4 Cranch 241, 279. In *The Apollon*, 9 Wheaton 362, and in the case of *The Itata* before the United States and Chilean Claims Commission, Moore's *International Arbitrations of the United States*, v. 1, p. 3067, the seizure declared improper was made in a common highway on the voyage to a foreign state, or in the territorial waters of a foreign state, which cases are too clear for doubt.

[2] *United States Arbitrations*, v. 1, p. 893. [3] u.s., p. 903.

Pursuit from Territorial Waters to the Open Sea.

We have mentioned that the exclusive authority of the state of the flag in the open sea is subject to a perhaps doubtful exception for the case of pursuit lawfully commenced in territorial waters and continued without interruption in the open sea. This extension of the right of the territorial state was voted unanimously by the Institute of International Law in 1894, and was expressed to include the right of judgment in case of such capture for an offence committed within territorial limits, the capture however to be immediately notified to the state of the flag[1]. The doctrine has the sanction of, among others, Bluntschli[2] and Hall[3]; and it may be regarded as the counterpart of the doctrine, admitted by Lord Stowell following Bynkershoek, that a belligerent capture may be made in territorial waters on a part of the coast where no damage can be done, if the contest began or the summons to submit to search was made outside those waters, and there has been a hot continuous pursuit[4]. Indeed the case is stronger, for the right of pursuit is not necessary to war, but is necessary to the effective administration of justice and to the secure enjoyment of fishery rights in time of peace. And Sir Charles Russell, in his argument before the Behring's sea arbitrators, after quoting his official experience as attorney-general and assuming that that of the United States counsel was the same, stated that "there is a general consent on the part of nations to the action of a state pursuing a vessel under such circumstances [an offence against municipal law committed within territorial waters], out of its territorial waters and on to the high sea[5]." It is true that the eminent advocate went on to say that it "is not a strict right by international law, but something which nations will stand by and see done, and not interpose if they think that the particular person has been endeavouring to commit a fraud against the

[1] 13 *Annuaire*, p. 330.

[2] *Droit International Codifié*, § 342.

[3] § 80.

[4] *The Anna*, 5 C. Robinson, 373, 385 *d*.

[5] *International Arbitrations of the United States*, by J. B. Moore, vol. 1, p. 893.

laws of a friendly power." But here, as so often, we are only encountering the difficulties which have their origin in the mistaken refinement which has been attempted about the name of law. In our sense of that word there can be no such thing as international law, if it does not exist in a case in which a general consent to it on the part of nations is admitted[1].

With these authorities and reasons in its favour, we should not have treated the right of pursuit as perhaps doubtful but for the great respect which we feel for M. Asser, who, as arbitrator between the United States and Russia on the capture of the *James Hamilton Lewis* and *C. H. White*, sailing ships of the former nation, by the cruisers of the latter, declared that "the system of the party defendant, according to which the ships of war of a state are allowed to pursue even beyond the territorial sea a vessel of which the crew has committed an unlawful act in the territorial waters or on the territory of that state, cannot be recognised as conformable to the law of nations, because the jurisdiction of a state does not extend beyond the limits of the territorial sea unless an exception has been made to that rule by an express convention[2]." We cannot but think that our learned friend's judgment in this particular showed an excess of caution.

[1] While it is necessary to point this out when quoting words used in the course of oral argument, we should do injustice to so eminent a jurist as Lord Russell of Killowen if we did not add our confident belief that on consideration, and with his pen, he would have recognised that the rule in question was law. He said that the consent was by acquiescence, but that, when general, is as binding as consent in writing; at least an English common-law judge could scarcely say otherwise. He admitted to M. de Courcel that the consent by acquiescence was "not in every case"; but with a context which shows that he contemplated no other limitation of the cases than that which is contained in the conditions of the rule, as that "it must be a hot pursuit, it must be immediate, and it must be within limits of moderation."

[2] *Revue de D. I. et de L. C.*, 2me série, t. 5, pp. 83, 90.

Jurisdiction in the open Sea.

Jurisdiction and authority are often used as equivalent terms, but strictly jurisdiction is a branch of authority, namely the right to try, judge and enforce judgment. With regard to what takes place on the high seas, this includes punishing all offences committed on board a ship, and giving their due effect, as elements in the status of persons or in civil actions, to all marriages, births, deaths, contracts and other civil facts which take place on board her. That must be done on land, as the circumstances do not permit judicial procedure at sea, and no words are needed to prove that, for facts occurring in the open sea, punishment and the direct judgment on their civil effects must belong to the courts of the state to the exclusive authority of which the ship was subject when they occurred, and that those courts will apply to the different cases the same laws as if the facts had occurred in the territory subject to them on land. There is nothing to indicate a competitive claim on the part of any other courts or laws, and if the effect of a civil fact which has taken place on board has to be judged indirectly as an element in an action which for other reasons is brought in another court, as if the title to property situate in a country foreign to the nationality of the ship depends on the lawfulness of a marriage contracted on board, still the same law must be applied as if the fact in question had occurred on dry land belonging to the state of the ship. We shall see that as to what happens in territorial waters the state authority over the locality may have to be taken into account as well as that over the ship. But on the high seas the territorial character impressed on the ship by its flag is a fiction as accurate for purposes of jurisdiction as a fiction can ever be. It only fails in cases of collision, in which, where the colliding ships are of different territorial character, a difficulty might arise. But a solution is furnished by the admiralty jurisdiction *in rem*, which enables proceedings to be taken in any port in which either ship charged with offending is found.

It is an important enquiry whether, when on the ground of self-defence the officers of a state foreign to a ship's flag may justifiably assert an authority on board or over her, the exception

so allowed to the exclusive authority of the state of the flag extends to jurisdiction. It may be argued that since the exercise of jurisdiction is a deliberate proceeding on land, it cannot be brought under the necessity which may exist for preventing the completion of a wrongful act at sea, and that persons captured by virtue of that necessity can only be secured in order to their undergoing punishment, if such they deserve, under the ordinary conditions of trial. Thus the British government, in its correspondence with Spain on the case of the Virginius, argued that after the vessel had been seized and the passengers and crew detained "no pretence of imminent necessity of self-defence could be alleged, and it was the duty of the Spanish authorities to prosecute the offenders in proper form of law, and to have instituted regular proceedings on a definite charge before the execution of the prisoners"; and that had this been done it would have been found that "there was no charge either known to the law of nations or to any municipal law under which persons in the situation of the British crew of the Virginius could have been justifiably condemned to death[1]." It may be suggested that the premises would have warranted a larger conclusion, and that when the necessity for self-defence was at an end, the prisoners ought to have been surrendered to the United States, to be dealt with under the jurisdiction carried by the flag. We shall see however, when discussing jurisdiction generally, that states extend a wide toleration to the assumption by many of them of a jurisdiction to punish acts, in the nature of offences against such states, which have been done abroad by foreigners who afterwards enter their territory. Acts justifying intervention for self-defence would belong to that category, and it may therefore well be that, if the Virginius was justifiably brought into a Spanish port, the right to punish those on board her for the attempt to assist the insurgents accrued to Spain on a principle tacitly allowed to operate in parallel cases. Still the British government will have been right in maintaining that it was an international wrong to inflict punishment summarily, and that even after regular trial the penalty of death would have been excessive; and it justly obtained compensation for the families of the British subjects executed.

[1] *Parliamentary Papers*, 1874, lxxvi; Hall, § 82.

Piracy.

Piracy was thus defined by one of the greatest of the older authorities on the law of nations, Sir Leoline Jenkins, in his charge to the jury at an admiralty sessions in 1668:

"That which is called robbing upon the high way, the same being done upon the water is called piracy. Now robbery, as 'tis distinguished from thieving or larceny, implies not only the actual taking away of my goods while I am as we say in peace, but also the putting me in fear by taking them away by force and arms out of my hands or in my sight and presence; when this is done upon the sea, without a lawful commission of war or reprisals, it is downright piracy[1]."

And of the authority and jurisdiction over pirates, which was universally held to belong to any state that could catch them, Sir Leoline said:

"All pirates and sea-rovers...are in the eye of the law *hostes humani generis*, enemies not of one nation or of one sort of people only but of all mankind. They are outlawed, as I may say, by the laws of all nations, that is, out of the protection of all princes and of all laws whatsoever. Every body is commissioned and is to be armed against them, as against rebels and traitors, to subdue and to root them out[2]."

Thus Sir Leoline Jenkins defines piracy as robbing on the water, and he expressly says that it "cannot be committed anywhere else but upon the sea, within the jurisdiction of the admiralty[3]." But Bynkershoek defines pirates as persons who depredate by sea or land without authority from a sovereign[4], and in past times some of the greatest evils of piracy have consisted in descents on coasts with devastation of the country and carrying the wretched inhabitants into captivity. Probably however no real discrepancy is intended here. As Hall observes: "piracy cannot take place independently of the sea, under the conditions at least of modern civilisation, but a pirate does not so lose his piratical character by landing within state territory that piratical acts done on shore cease to be piratical[5]." By this we understand, and agree to the doctrine, that if the robber were afterwards caught at sea, what he had done on land would

[1] *Life of Sir L. J.*, v. 1, p. lxxxvi.
[2] *Ibid.*
[3] u.s.
[4] *Quæstiones Juris Publici*, l. 1, c. 17.
[5] § 81.

be evidence of his nefarious avocation, and the captor's state would have jurisdiction over him even though there might be no proof that his ship had been concerned in any act of violence on the water; while on the other hand we agree with Dr Lawrence that, if he were caught on land, his character as a pirate would be thrown into the shade and overridden by the fact that he was amenable to the territorial law for what he had done there[1]. Here we understand "land" strictly. If the pirate is captured in a port or creek, the captor's state will have jurisdiction[2].

The universality of the authority and jurisdiction over pirates and piratical ships, which anciently the captors exercised in a summary way by drowning or hanging from the yard arm, is not to be regarded as an exception to the exclusive authority and jurisdiction of the state of the flag, but as a consequence of the fact that piracy implies a rejection of all public rule, and of the general agreement of nations, testified by Jenkins, to meet that rejection by regarding pirates as outlawed and out of their protection. There is consequently no state flag in the case. If the piratical ship was ever entitled to carry one, her title to do so has been withdrawn. A recent writer, Dr Gareis, while admitting that any ship of war may capture a piratical vessel, has asserted that the right of punishing the pirates belongs only to the criminal jurisdiction of their country[3]. But he has not been followed, and Despagnet, one of the latest and best authorities, draws the old conclusion from the old grounds: *De là*, he says, *cette conséquence, admise de tout temps, que le pirate peut être saisi par les navires de n'importe quel état, et jugé par l'autorité compétente du pays qui a fait sa capture*[4]. The court in which the trial shall be held and the punishment to be inflicted will depend on the legislation of the captor's country, so too will the question whether the ship and the pirates' goods

[1] *Principles of International Law*, p. 210.

[2] *The Magellan Pirates*, 1 Spinks 81, in which case Dr Lushington said: "we all know that pirates are not perpetually at sea but under the necessity of going on shore at various places, and of course they must be followed and taken there or not at all"; p. 86. The attack on the Huascar (below, p. 182) took place in what Peru claimed as territorial water, and Calvo (§ 1153) considers this a fatal objection to it; but the British government refused to admit the claim of Peru.

[3] Holtzendorff's *Handbuch des Völkerrechts*, v. 2, pp. 578, 9.

[4] *Cours de Droit International Public*, § 440.

will go to the captors as prize or will be otherwise disposed of. But one maxim is universally accepted: *pirata non mutat dominium.* A piratical robbery does not divest the title of the person robbed, and on recapture the person robbed will be recognised as still the owner.

Are Unrecognised Insurgents Pirates?

Piracy, which once played so great a part in all seas, and especially in the Mediterranean and Caribbean, is now little heard of except in the Far East. But in other parts of the world the frequency of insurrections supported by naval forces, for the proceedings of which it was necessary to find some place in international law, has given a new prominence to the name. Those proceedings, so far as they are political and directed against the governments combated by the insurgents, are not of the nature of robbery and therefore do not fall under the ancient definition of piracy, though if an insurgent ship uses violence against third parties, her behaviour in doing so is not the less piratical because other parts of her activity are political. At the same time, so long as the insurgents whom she abets have not been recognised by the state called on to deal with her case as having belligerent rights, all parts of her activity have this in common with piracy, that they are without sanction from any authority recognised as competent to give it; and by fixing the mind on this circumstance, which in the case of piracy properly so called is the necessary consequence and adjunct of systematic robbery, as though it were the essence of the crime independent of an *animus furandi*, it became possible to bring even the political operations of insurgents under the head of piracy. During the insurrection of the Spanish American colonies one Thomas Smith, who from his name may be supposed to have been a United States citizen, with others, in a ship which they had seized by violence, plundered and robbed a Spanish vessel, and for so doing was convicted of piracy in the United States, the judgment of the Supreme Court (1820) being delivered by Story[1]. It may be inferred from the report that the act was one of war, done under a commission from an unrecognised insurgent

[1] *United States* v. *Smith*, 5 Wheaton 153.

government, but this is not noticed in Story's judgment. The point afterwards arose in the clearest manner in the case of *The Ambrose Light*, a ship which was the lawful property of unrecognised insurgents against the republic of Colombia, and of which none of the officers or crew were citizens of the United States. She was taken by a United States gunboat, carrying soldiers and arms, on her way to assist in the blockade and siege of the American Cartagena, which was holding out for the Colombian government; and she was condemned as prize though it is not alleged that she or those on board her had done any act of violence before her capture, but the political party with which she was acting had burnt the seaport town of Colon, occasioning great loss to United States citizens. The court said (1885) that "whether a foreign nation shall exercise its rights only when its own interests are immediately threatened, or under special provocation only after injuries inflicted by the insurgents, as in this case at Colon, is a question purely for the executive department. But when a seizure has been made by the navy department under the regulations, and the case is prosecuted before the court by the government itself, claiming *summum jus*—its extreme rights—the court is bound to apply to the case the strict technical rules of international law[1]." It follows that in the view of the court it is not in excess of extreme right that a ship's mere engaging in war on behalf of an unrecognised body should be so completely piracy as to give the authority to seize her, and the jurisdiction to condemn her, to a state not connected with her or with those on board her by property, nationality, political hostility or damage inflicted. But the ship was released on the ground that the United States government had recognised a state of war by implication.

The opposite view was maintained in 1877 by the government of Brazil. The Spanish steamer Montezuma was seized by Cuban insurgents, and sent by them under the new name of the Cespedes to attack Spanish merchantmen in the river Plate. The government of Spain requested that of Brazil to treat her as a pirate if she entered any of its ports; but the Baron de Cotejipe, the Brazilian minister of foreign affairs, refused this in a despatch in which he said:

[1] *The Ambrose Light*, 25 Federal 408, Scott's Cases 346.

"Les pirates, à proprement parler, sont ceux qui courent les mers pour leur propre compte, sans autorisation compétente, dans le but de s'emparer de force des navires qu'ils rencontrent, en commettant des déprédations contre toutes les nations indistinctement. Cette définition ne peut certainement s'appliquer à ceux qui ont pris le Montezuma. À cela s'opposent les arguments mêmes mis en avant par la légation de sa Majesté Catholique. Les hostilités qu'elle dénonce et prévoit ne sont pas dirigées contre toutes les nations, mais uniquement contre l'Espagne; elles n'ont pas pour but de commettre des déprédations, mais d'aider la cause d'une colonie en insurrection[1]."

The minister made at the same time the pregnant remark that "every government which is not interested in an insurrection is at liberty in certain circumstances to acknowledge the insurgents in the character of belligerents." It would indeed be unjust that the treatment of belligerents as pirates should depend on whether it suited the political convenience of a third-party state to recognise them as having belligerent rights. A public ship of a recognised state escapes the charge of piracy till either her government disclaims her or she has thrown off her allegiance to it, because recourse may be had to that government for the redress of the wrongs which she may commit. Similarly, if a ship has at her back a political body solid enough to be recognised as having belligerent rights whenever it suits third states to do so, a state which she offends can if it pleases make its just indignation felt by that body in case of need, and for the same reason as in the case of a state it is to that body that recourse should first be had. And since the position in which the recognition of belligerent rights would be proper is only to be attained by the performance of acts of war, it would even in the commencement of an insurrection be illogical, as Hall observes, to pretend that acts are piratical which are done for the purpose of setting up a legal state of things that can only be produced by the very acts in question[2]. If however an insurgent ship, not yet having at her back a political body solid enough to answer for her, should display the *animus furandi* against the subjects of a third-party state, there would be just cause for her being treated as a pirate against them.

Dr Lushington also adhered to the old definition of piracy,

[1] Calvo, § 1152. [2] § 81.

and drew from it the same conclusions. "Piratical acts," he said, "are robbery and murder upon the high seas....I think it does not follow that, because persons who are rebels and insurgents may commit against the ruling power of their own country acts of violence, they may not be, as well as insurgents and rebels, pirates also; pirates for other acts committed towards other persons...especially if such acts were in no degree connected with the insurrection or rebellion[1]." And the British government has acted on the same principles. In 1873 the Spanish ships of war stationed at the European Cartagena fell into the hands of insurgents whom the government at Madrid thereupon proclaimed to be pirates, but the British, French and German governments instructed their naval commanders in the neighbourhood that they were not to be interfered with so long as the lives or property of subjects of the respective states, adding Italy in the case of the British instructions, were not threatened. If, in the course of any interference which might be needed, Spanish persons or ships were captured, they were to be delivered to the agents of the Madrid government, the only one in Spain which the powers recognised. In 1877 the Peruvian ironclad Huascar revolted as at least one of the first acts, if it was not indeed the only act, in an insurrection. She put to sea and took a supply of coal from a British ship without settling for payment, and took two Peruvian officials from another British ship. The British admiral on the station attacked her as a pirate, in which his government approved him, and refused the satisfaction which the Peruvian government, notwithstanding that it had declared that it would not be responsible for the acts of the Huascar, demanded.

If an insurgent ship continues to commit hostilities after the government on which she depends has to the knowledge of her commander ceased to exist, this will be piratical. The Confederate cruiser Shenandoah continued her depredations on United States vessels in the seas around Cape Horn for several months after the fall of the Confederate government, but as it was in ignorance the British authorities, on her arrival at Liverpool, allowed the captain and crew to go free and delivered the ship to the United States.

[1] *The Magellan Pirates,* 1 Spinks 81, 83.

CHAPTER IX.

TERRITORIAL WATERS.

Littoral Sea and Gulfs.

We have seen that the open sea is not within the sovereignty of any state because it is incapable of occupation. But neither the reason nor the conclusion applies to such part of the sea as is sufficiently near the land. That part may be of two descriptions. It may be a strip of a certain width extending along a coast and called littoral sea, or it may penetrate into the land as what is called a gulf. In either case it is capable of occupation by the sovereign of the land and therefore of becoming his territorial water. The means of occupation consist partly in the forts and batteries on shore, or in the shore itself considered as a platform from which guns not stationary can be fired, which are the means usually contemplated by writers on international law, and partly and not less really in the force which all maritime states maintain afloat. The analogy of the occupation of land shows that it is not necessary that every point of territorial water should at every moment be within the range of fire from a gun, even when we take guns afloat into account as well as those on shore. It is enough on *terra firma* that the sovereign's police should be adequate to render breach of his laws exceptional, and in general to punish it when it occurs. So much authority as that can be effectually provided in littoral seas and gulfs, and so far as it is possible to provide it the appropriation of those waters by the sovereign of the land is legitimate in principle. To complete the justification, however, there must be sufficient motive, nor is that far to seek. The sea

is a source of wealth from fishing, including that of pearls and amber obtainable from its bed, and this, within the narrow part bordering on the land, would be a scene of anarchy if left to the free competition of the world. Within the same part also the bed of the sea is a source of wealth from minerals, obtained by subterraneous and subaqueous working from the land, and the control over it is necessary for the defence of the coast and the prevention of smuggling. Indeed the motive is so strong that it has often led, in waters of which the occupation is impossible, to acts inadmissible there by strict law because implying sovereignty, as in the hovering laws of many countries[1]. For the establishment of sovereignty the motive and the occupation must be combined[2]. For that purpose, in order to avoid difficult questions as to the actual force available, occupation is presumed to a geographical extent presently to be considered. Within that extent the water and its bed are territorial, and the wealth of both is the property of the territorial sovereign. Outside it the enjoyment of the sea and its contents is free to all, and any necessary or desirable regulation must be obtained by international treaties, as has often been done in fishery matters, notably by the convention of 1839 between England and France as to the Channel, and by the North Sea convention of 1882 between Great Britain, France, Belgium, the Netherlands, Germany and Denmark.

The principle of a presumed limit to occupation was laid down by Bynkershoek, who, taking into account only force exercisable from the shore, taught, first, as a general maxim, *imperium terræ finiri ubi finitur armorum potestas*, and secondly, as the application of that maxim to his own time, the range of cannon, then considered to be three sea miles of sixty to a degree of latitude[3]. Hence that distance, measured from low water

[1] See above, p. 171.

[2] A state *ne peut s'approprier une chose commune telle que la mer qu'autant qu'il en a besoin pour quelque fin légitime, et d'un autre côté ce serait une prétention vaine et ridicule de s'attribuer un droit que l'on ne serait aucunement en état de faire valoir.* Vattel, l. 1, § 289.

[3] Bynkershoek's argument is in the dissertation *De Dominio Maris*, but the maxim, in the terse form quoted in the text, occurs in the *Quæstiones Juris Publici*, l. 1, c. 8.

mark, became a commonplace among authors for the width of the littoral sea, and we may say that the agreement on it as a minimum is universal: no state claims less. As a maximum the agreement is not universal, and it may be doubted whether it is so nearly such as to make it a rule of international law, while the increased range of cannon-shot, as well as the increased need of protection for shore fisheries against trawl nets and other destructive devices, has made the reason for it quite obsolete and inadequate. The width claimed by Spain is six miles, but that claim has been disputed by Great Britain and the United States[1]. Norway claims four, and the Institute of International Law in 1894 agreed *nemine contradicente* to recommend six miles as the width, after a division in which the proposal of ten miles, made by M. de Martens, was rejected by 25 votes against 10[2]. The nearest approach to an official understanding is to be found in Art. 4 of the Suez Canal convention of 1888, which prohibits hostilities within three sea miles from the ports at the extremities of the canal, but M. de Freycinet desired a limit better proportioned to the increased range of cannon, and the stipulation is not so expressed as to fix a maximum[3]. It may be considered that three miles is a width lying so far within both the possibility of occupation and the range of the motive that the presumption of occupation and consequent sovereignty to some larger extent could not be denied to any power which had consistently declined to be bound by so narrow a limit. Of course a power which had admitted the three-mile limit by international engagements could not extend it in its own favour without the consent of the parties to those engagements; and probably a power which without contract had admitted that limit by its internal legislation or by official statements could not extend it, to the detriment of neighbours whom it had allowed to fish up to it, at least until there had been some wide concurrence of states in

[1] Lord Seabury to Mr Watson, 25 Dec. 1874, and Mr Fish in United States Diplomatic Correspondence, 1875, p. 641; quoted by Boyd, 3rd English edition of *Wheaton's Elements*, p. 271.

[2] *Annuaire*, v. 13, p. 290. The rules adopted at this meeting with regard to the territorial sea are on pp. 328—331.

[3] See what is said below on certain fishery limits, p. 187, note 2.

support of such an extension as already commands the assent of thinkers.

The area of the land on which a strip of littoral sea is dependent is of no consequence in principle. Guns might be planted on a small island, and we presume that even in practice an island, without reference to its actual means of control over the neighbouring water, carries the sovereignty over the same width of the latter all round it as a piece of mainland belonging to the same state would carry[1]. But an extreme case may be put of something which can scarcely be called an island. "If," Sir Charles Russell said when arguing in the Behring sea arbitration, "a lighthouse is built upon a rock or upon piles driven into the bed of the sea, it becomes as far as that lighthouse is concerned part of the territory of the nation which has erected it, and, as part of the territory of the nation which has erected it, it has incident to it all the rights that belong to the protection of territory—no more and no less[2]." It is doubtful from the context whether the eminent advocate meant by this to claim more for the lighthouse in its territorial character than immunity from violation and injury, of course together with the exclusive authority and jurisdiction of its state. It would be difficult to admit that a mere rock and building, incapable of being so armed as really to control the neighbouring sea, could be made the source of a presumed occupation of it converting a large tract into territorial water. It might however be fair to claim an exclusive right of fishing so near the spot that, without the light, fishing there would have been too dangerous to be practicable[3].

The case of the pearl fishery is peculiar, the pearls being obtained from the sea bottom by divers, so that it has a physical connection with the stable element of the locality which is wanting to the pursuit of fish swimming in the water. When carried on under state protection, as that off the British island

[1] We have seen above, p. 118, that Lord Stowell held the neutrality of the United States to extend three miles outwards from the mud islands off the coast of the Mississippi.

[2] 1 Moore's *United States Arbitrations* 900.

[3] See what is said about the Seven Stones above, pp. 117, 118. That case is not exactly in point, being one of a lightship and not a lighthouse.

of Ceylon, or that in the Persian Gulf which is protected by British ships in pursuance of treaties with certain chiefs of the Arabian mainland, it may be regarded as an occupation of the bed of the sea. In that character the pearl fishery will be territorial even though the shallowness of the water may allow it to be practised beyond the limit which the state in question generally fixes for the littoral sea, as in the case of Ceylon it is practised beyond the three-miles limit generally recognised by Great Britain. *Qui doutera*, says Vattel, *que les pêcheries des perles de Bahrein et de Ceylan ne puissent légitimement tomber en propriété*[1]*?* And the territorial nature of the industry will carry with it, as being necessary for its protection, the territorial character of the sea at the spot.

As to bays, if the entrance to one of them is not more than twice the width of the littoral sea enjoyed by the country in question—that is, not more than six sea miles in the ordinary case, eight in that of Norway, and so forth—there is no access from the open sea to the bay except through the territorial water of that country, and the inner part of the bay will belong to that country no matter how widely it may expand. The line drawn from shore to shore at the part where, in approaching from the open sea, the width first contracts to that mentioned, will take the place of the line of low water, and the littoral sea belonging to the state will be measured outwards from that line to the distance, three miles or more, proper to the state[2]. But although this is the general rule, it often meets with an exception in the case of bays which penetrate deep into the land and are called gulfs. Many of these are recognised by immemorial usage as territorial sea of the states into which they

[1] L. 1, §287. See also Sir C. Russell in the Behring sea arbitration, 1 Moore 901, and Chief Justice Cockburn in *Reg.* v. *Keyn*, L. R., 2 Exch. D., 199.

[2] The conventions above referred to (p. 184) relating to the English Channel and the North Sea recognise the exclusive right of fishery to a distance of three miles from low water mark, and in bays of which the opening from headland to headland does not exceed ten miles. There is thus an inconsistency between the two limits, no doubt justified by fishery conditions, but detracting from any authority which it might be thought attaches to the conventions in question as helping to determine the limit of the general territorial right either for bays or for a less indented coast line.

penetrate, notwithstanding that their entrance is wider than the general rule for bays would give as a limit to such appropriation. Examples are the Bay of Conception in Newfoundland, penetrating forty miles into the land and being fifteen miles in average breadth, which is wholly British[1], Chesapeake and Delaware Bays, which belong to the United States[2], and the Bay of Cancale, seventeen miles wide, which belongs to France. Similar exceptions to those admitted for gulfs were formerly claimed for many comparatively shallow bays of great width, for example those on the coast of England from Orfordness to the North Foreland and from Beachy Head to Dunnose, which, together with the whole of the Bristol Channel and various other stretches of sea bordering on the British Isles, were claimed under the name of the King's Chambers[3]. But it is only in the case of a true gulf that the possibility of occupation can be so real as to furnish a valid ground for the assumption of sovereignty, and even in that case the geographical features which may warrant the assumption are too incapable of exact definition to allow of the claim being brought to any other test than that of accepted usage. It is sometimes said and may be historically true that all sovereignty now enjoyed over the littoral sea or certain gulfs is the remnant of the vast claims which, as we have seen[4], were once made to sovereignty over the open sea, and which it is held have been gradually reduced to a tolerable measure through such intermediate stages as that of the King's Chambers; and the impossibility of putting the claim to gulfs in a definite general form may be thought favourable to that view. None the less however the rights which are now admitted stand on a basis clear and solid enough to distinguish and support them.

[1] *Direct United States Cable Company Limited* v. *Anglo-American Telegraph Company Limited,* L. R. 2 Ap. Ca. 394.

[2] Wharton's *Digest,* § 28; Taylor, § 229.

[3] An undefined extent of the upper part of the Bristol Channel is still claimed by Great Britain, and is fairly within the principle of gulfs: *Reg.* v. *Cunningham,* Bell's Crown Cases 86.

[4] See above, p. 161. The view referred to is that of Hall, § 40.

Limits and Nature of the Right in the Littoral Sea and Appropriated Gulfs.

We have described the right enjoyed by a state in its littoral sea and appropriated gulfs as sovereignty, in accordance with the conclusion to which our examination of the possibility of occupation as the foundation of the right led us. But since it is possible for passing foreigners to enjoy without resulting mischief greater freedom on territorial water than on territorial land, that freedom is established in their favour by rules which cannot be better expressed than in the following portion of the resolutions adopted in 1894 by the Institute of International Law.

Art. 5. All ships without distinction have the right of innocent passage (*passage inoffensif*) through the territorial sea, saving to belligerents the right of regulating such passage and of forbidding it to any ship for the purpose of defence, and saving to neutrals the right of regulating the passage of ships of war of all nationalities through the said sea.

Art. 6. Crimes and offences committed on board foreign ships passing through the territorial sea by persons on board of them, against persons or things on board the same ships, are as such outside the jurisdiction of the littoral state, unless they involve a violation of the rights or interests of the littoral state or of its subjects[1] not forming part of the crew or passengers.

Art. 7. Ships which pass through territorial waters must conform to the special regulations published by the littoral state in the interest and for the safety of the navigation or as matter of maritime police.

Art. 8. Ships of all nationalities are subject to the jurisdiction of the littoral state by the simple fact that they are in territorial waters, unless they are only passing through them.

The littoral state has the right to continue on the high seas a pursuit commenced in the territorial sea, and to arrest and judge the ship which has broken its laws within its waters[2]. In case however of capture on the high sea, the fact shall be notified without delay to the state of which the ship carries the flag. The pursuit must be interrupted as soon as the ship enters the territorial sea of its own country or of a third power. The

[1] *Ressortissants*, which includes persons, if any, over whom jurisdiction is claimed by reason of domicile as well as proper subjects or nationals. This article and the first paragraph of art. 8 will be further noticed in chapter XI.

[2] We have quoted this above, p. 173.

right to pursue is at an end as soon as the ship has entered a port of its own country or of a third power.

Art. 9. The peculiar situation of ships of war and the ships assimilated to them is reserved.

It is necessary here to guard against an erroneous inference which might be drawn from the doctrine expressed in the above art. 7. The right of the littoral state to publish regulations in the interest of the navigation does not include a right to exact payment of dues, by ships not entering its harbours, under pretext of providing the navigation with necessary lights and buoys. It has been well said by Dr Stoerk that

"The institutions provided by littoral states for the benefit of maritime traffic find their compensation, in part directly by harbour dues, light dues and so forth"—the context shows that the light dues here mentioned are only those exacted in harbours—"in part indirectly in securing and advancing the maritime traffic of their own nationals. Although lighting and buoying a coast is doubtless of great use even to navigation on the high sea, it gives by customary law no claim to the littoral state, not even when the passing ship has crossed the boundary of the littoral water. The development of this doctrine was owing both to the technical difficulties in the way of levying such tolls, and to the operation of reciprocity in distributing the burdens and the benefits of such institutions among all seafaring nations in a fairly equitable manner. The nation which performs its administrative duty as a state by erecting and maintaining these helps to maritime traffic secures to its own subjects, through the modern system of treaties of commerce and navigation, the advantages of the parallel administrative action of all other nations having intercourse with the world. Grotius adhered to the older practice, issuing from a fiscal point of view, when he wrote *quare nec contra jus naturæ aut gentium faciet qui, recepto in se onere tuendæ navigationis juvandæque per ignes nocturnos et brevium signa, vectigal æquum imposuerit navigantibus:* l. 2, c. 3, § 14. His commentator Cocceji, in the spirit of all the old school, agrees with him. But by the end of the eighteenth century levying such dues was already considered as permissible only in such narrow seas as from their dimensions can be regarded as littoral waters[1]."

Since the end of the eighteenth century a further progress has been made, and even littoral waters now present no exception to the rule that dues cannot be levied on passing ships without

[1] Holtzendorff's *Handbuch des Völkerrechts*, v. 2, p. 494. Stoerk quotes Cocceji as saying: *Princeps enim uti territorium cujus imperium occupavit securum præstare debet, ita et mare. At quia suis sumptibus id facere non tenetur, merito a transeuntibus ideo exigere aliquid potest.* On Grotius, l.c.

express sanction from treaty, as in the case of the light maintained on Cape Spartel under a treaty between all or most of the maritime states of the world. We shall meet with this principle again in the case of the Sound dues[1].

The circumstance that the right of the littoral state is limited by the right of innocent passage has led to the question whether, instead of speaking of sovereignty over territorial seas subject to the latter right as a servitude or easement, it would not be more suitable to say that the littoral sea and gulfs are not territorial, though subject to certain rights of the littoral state, which in their turn would thus assume something of the character of servitudes. The Institute of International Law decided by a large majority in favour of the existence of a territorial sea subject to sovereignty, and rightly as we think for several reasons. First, the occupation which is the ground of sovereignty is possible. Secondly, either way certain rights will have to be treated as exceptions to those implied in the terminology adopted, and these can be more simply stated if they consist in innocent passage than if we have to enumerate all the rights reserved to the littoral state. Thirdly, if on any occasion it should be questioned whether the enumeration of the rights to be treated as exceptions to those implied in the terminology is exhaustive, the predominant part in deciding on the new case will be given to the littoral state if it is regarded as sovereign, and this is as for its safety it should be. Fourthly, it would be impossible to doubt the territorial character of ordinary harbours, though not included within low water mark, and these shade insensibly into bays with openings twice the width of the littoral sea, which again, so far as concerns sovereignty, cannot be distinguished in principle from the littoral sea itself. In the case of the Franconia (*The Queen* v. *Keyn*) the judges were divided on the question whether the littoral sea is part of the territory of England, but there were other grounds for denying the court's jurisdiction, and the captain of a foreign ship, who had caused death by negligent navigation within the three-mile limit, was discharged[2]. Thereupon parliament, by the Territorial Waters Jurisdiction Act 1878, recited that "the

[1] See below, p. 149.

[2] L.R., 2 Exch. D., 63.

rightful jurisdiction of Her Majesty, her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions, to such a distance as is necessary for the defence and security of such dominions," and proceeded to lay down rules of jurisdiction and procedure which we shall have to mention in treating of that subject. This language favours the view that the right is one of sovereignty, and abstains from fixing a maximum width for its zone.

It is necessary here to notice the view of so eminent an authority on international law as Hall, who asserts that "the right of innocent passage does not extend to vessels of war." He argues that "no general interests are necessarily or commonly involved in the possession by a state of a right to navigate the waters of other states with its ships of war. Such a privilege is to the advantage only of the individual state, it may often be injurious to third states, and it may sometimes be dangerous to the proprietors of the waters used[1]." But a ship of war as well as a merchantman may have a lawful errand beyond the littoral sea in question, the importance of which consideration we have seen in the case of international rivers[2]. In the course of its lawful voyage it may be difficult for it to avoid the littoral sea, especially if the width of the latter should receive any general extension. And the possession by the littoral sovereign of a right to interrupt the voyage would expose him, if neutral, to the most inconvenient demands from belligerents for his exercise of that right, while his own safety is sufficiently provided for by the authority to regulate which article 5 of the Institute reserves to him. It would be a very different matter for ships of war to take up even a temporary station in foreign, though friendly, territorial waters, and except under stress of weather they do not in fact do so without previously obtaining permission. Indeed even for vessels which are not ships of war the right of innocent passage does not include an unlimited right of anchoring or hovering. Fishermen may not in territorial waters even prepare to fish. If they might do so, an impossible strictness of surveillance would be necessary to prevent their fishing in them.

[1] § 42.

[2] Above, p. 144.

Straits.

The straits which have to be considered in international law are those of which the width is not more than twice that of the littoral sea of the country, if only one, through which they lead, or not more than the aggregate width of the littoral seas of the two countries between which they lead, ordinarily therefore not more than six sea miles, so that no way through them can be had without passing through territorial water. The strait or each half of it is littoral sea of the respective littoral state, and there is a right of innocent passage through it dependent on the existence of a lawful destination beyond it for the sake of which such passage is desired[1]. If the strait connects two tracts of open sea, as the Gut of Canso between Cape Breton island and the mainland of Nova Scotia, or the Straits of Magellan and the other passages in the extreme south of America, the lawful ulterior destination is clear, and there is a right of transit both for ships of war and for merchantmen. If the strait leads through a single country into an inland sea lying entirely within the same country, as was formerly the case of the Bosphorus leading through Turkish land on both sides into the Black Sea, entirely surrounded by Turkish land until Russia gained a footing on its coast by the treaty of Kainardji in 1774, nothing is presented but an extreme instance of a bay the entrance to which is less than twice the width of the littoral sea. The rule that the inner part of such a bay, no matter how widely extended, belongs to the country in which it lies must be applied. It will be within the right of that country to exclude foreign navigation from its internal waters, and consequently from the strait which leads to them; and in fact, at the time mentioned, the Black Sea was a closed sea of the Turkish empire, and navigation through the Bosphorus was forbidden to foreign ships of war and merchantmen equally.

If the coast of the inland sea to which the strait leads is divided between two or more states, as has been the case with the Black Sea since 1774 and has always been the case with the Baltic, each of those states, whether bordering on the strait or

[1] See above, pp. 144, 192.

not, has in principle the right to admit ships from the open sea, whether military or mercantile, to its ports, and to seek egress to the open sea for its own military or mercantile flag, while outside states have in principle the right of access from the open to the inland sea for purposes of war. Here there is a lawful ulterior destination in each direction, carrying the right of innocent passage through the strait, whether its opposite shores belong to a single state, as those of the Dardanelles and Bosphorus to Turkey, and those of the Great and Little Belts to Denmark, or to different states, as those of the Sound to Denmark and Sweden since 1658, previous to which date both shores of the Sound also belonged to Denmark. As regards the mercantile flag the matter stands actually in practice as the principle requires, although in the case of the Baltic the full application of the principle was restricted till 1857 by the Sound dues, originally exacted by Denmark as sovereign of the passages, and as rendering services to navigation in connection with them. These were respected as immemorial, and their amount was regulated by numerous treaties, till they were redeemed for pecuniary indemnities by conventions concluded in 1857, one with the principal maritime states of Europe and the other with the United States of America. On this occasion the future freedom of ships not entering Danish harbours from exactions for lighting and buoying was secured by the promise of Denmark "not to subject any ship, on any pretext, to any detention or hindrance in the passage of the Sound or the Belts." As regards the military flag in the great European straits political considerations have intervened.

Notwithstanding the acquisition of certain Black Sea coast by Russia, and at later dates by Rumania and the vassal principality of Bulgaria, the straits of Constantinople have remained closed in general to ships of war other than Turkish, not as a matter of legal principle but by the free determination of the powers to continue to that extent the ancient state of things. Thus in the treaty of 1809 between Great Britain and Turkey, commonly called the treaty of the Dardanelles, it is said that "as ships of war have at all times been prohibited from entering the Canal of Constantinople, namely in the Straits of the Dardanelles and of the Black Sea, and as this ancient regulation

of the Ottoman empire is in future to be observed by every power in time of peace, the court of Great Britain promises on its part to conform to this principle." And in the preambles of the conventions of 1841 and 1856 the Christian powers "record in common their unanimous determination to conform to the ancient rule of the Ottoman empire, according to which the Straits of the Dardanelles and of the Bosphorus are closed to foreign ships of war so long as the Porte is at peace." Then follow the operative articles, the Sultan declaring his resolution in that sense and the Christian powers engaging to respect it. The convention of 1856 was "maintained" by Art. 2 of the treaty of London of 1871, adding a "power to his Imperial Majesty the Sultan to open the said straits in time of peace to the vessels of war of friendly and allied powers, in case the Sublime Porte should judge it necessary in order to secure the execution of the stipulations of the treaty of Paris of 30th March 1856." Afterwards, in 1878, Lord Salisbury inserted the following declaration in the 18th protocol of the congress of Berlin:

"Considering that the treaty of Berlin will modify an important part of the arrangements sanctioned by the treaty of Paris of 1856, and that the interpretation of Art. 2 of the treaty of London, which is dependent on the treaty of Paris, may thus become a matter of dispute, I declare on behalf of England that the obligations of Her Britannic Majesty relating to the closing of the straits do not go further than an engagement with the Sultan to respect in this matter His Majesty's independent determinations in conformity with the spirit of existing treaties."

Count Schouvaloff then inserted the following counter-declaration:

"The plenipotentiaries of Russia, without being able exactly to appreciate the meaning of the proposition of the second plenipotentiary of Great Britain respecting the closing of the straits, restrict themselves to demanding on their part the insertion in the protocol of the following observation—that in their opinion the principle of the closing of the straits is a European principle, and that the stipulations concluded in this respect in 1841, 1856 and 1871, confirmed at present by the treaty of Berlin, are binding on the part of all the powers in accordance with the spirit and letter of existing treaties, not only as regards the Sultan but also as regards all the powers signatory to those transactions."

Referring to his above declaration Lord Salisbury said in the House of Lords on 7th May 1885:

"The object of the declaration which I had to make on behalf of Her Majesty's Government I understood to be to establish the principle that our engagements in respect of the Dardanelles were not engagements of a general European or international character, but were engagements towards the Sultan only; the practical bearing of that reservation being that if in any circumstances the Sultan should not be acting independently but under pressure from some other power, there would be no international obligation on our part to abstain from passing through the Dardanelles."

The distinction between engagements towards the Sultan only and those of a general European character seems to have been rather infelicitously chosen as a ground for Lord Salisbury's practical conclusion, for he had himself said at Berlin, with reference to the confirmation of the treaty of 1871, that, if Batoum had not been declared a free and commercial port, England would not have been able to engage herself *towards the other European powers* to interdict herself from entering the Black Sea[1]. But in substance Lord Salisbury was in our opinion right, for an engagement depending on the Sultan's judgment of what should be necessary in order to secure the due performance of the treaty of Paris, towards whatever power such engagement exists, must surely refer to the Sultan's independent judgment, and not to that which he might be made to express by pressure from some other power.

The political history of the Baltic is that of the rise, progress and final defeat of an idea never proclaimed with regard to the Black Sea, namely that the states surrounding it could by their agreement convert the Baltic into a closed sea of their own, in which outside powers should not be allowed to carry on any operations of war. The effect of this, if realised, would be to unite all the Baltic states in a league of semi-alliance or at least of mutually benevolent neutrality; first, if any of them should be at war with an outside power, shielding its coast and commerce in the Baltic from attack or blockade, and allowing it to receive contraband of war by way of that sea, while also permitting it to use the Baltic as a place of arms, and the Sound

[1] This point is made by Geffcken, in 17 *Revue de D. I. et de L. C.*, p. 366.

as a sally port, for naval operations in the open sea; secondly, in case of a war anywhere, allowing neutral Baltic states to carry on a trade in contraband without interference till the vessels engaged in it reached the open sea. The idea comes to light in the treaty of Roeskilde between Sweden and Denmark, 1658, in which they agree not to allow foreign ships of war to enter the Baltic by the Sound or the Belts[1]. But it attained its full development only by the convention of 1st August 1780 between Sweden and Russia, to which Denmark acceded the same year and Russia in 1781. The parties to this convention, which was one of those constituting the First Armed Neutrality, after reciting that all the powers surrounding the Baltic were in the enjoyment of the most profound peace, agreed "to maintain perpetually that it is a closed sea, and must be regarded as such by its local position, in which all nations may navigate in peace and enjoy the advantages of perfect tranquillity; in consequence they will take all measures to guarantee that sea and its coasts against all hostilities, piracy and violence." England however, France and Holland, the principal parties on both sides to the war then raging, declined to accept the neutrality of the Baltic except for that war. And when in 1807 the czar complained of the bombardment of Copenhagen because he was one of the guarantors of the tranquillity of the Baltic, the British answer denied that England had ever acquiesced in the principles on which it had been attempted to establish the inviolability of that sea. No one suggested that Denmark or Sweden had committed a breach of neutrality during the Crimean war by allowing, without protest, the passage of the Sound by British and French ships of war hostile to Russia; and the idea of closing the Baltic may be said to have been finally set at rest by the engagement of Denmark in 1857, quoted above[2], which applies without any distinction of military or mercantile flags[3].

[1] The treaty of 1759 between Sweden and Russia, to which Denmark acceded in 1760, is sometimes quoted as a further step in the promotion of the idea, but it seems to have related only to the war then raging.

[2] p. 194.

[3] Heffter thought that the closing or neutrality of the Baltic, attempted by the Armed Neutralities, was not "a blamable incongruity," but his posthumous editor Geffcken disagreed with him: § 76. See also Geffcken's article in 17 *Revue de D. I. et de L. C.*, p. 362.

CHAPTER X.

NATIONALITY AND ALIENAGE.

Nationals and Aliens.

We must now recur to the datum of experience that a state is an ideal body, having a certain territory and composed of certain persons as its members or nationals, all others being foreigners or aliens[1]. We have considered the territory of the state, land or water: its international sovereignty in relation thereto may be summed up in the exclusive right to use force within it. We have now to consider the more complicated relation of the state to individuals; what are the conditions entitling a person to its nationality, that is to the character of a national, and how the distinction between nationals and aliens operates in practice.

The character of member or national of a given state depends on parentage or place of birth according to rules which we shall consider, but subject to those rules it is not limited for international purposes by the fact that for internal purposes distinctions may be drawn between different classes of the population, none of which have any tie to any other state. Thus the name and rights of citizen are refused by the French to certain subject populations in Africa, and by the United States to the Red Indians and Filippinos, permanent inhabitants of their respective territories. And in a monarchy, although the name "subject" does not admit of being refused like that of "citizen" in a republic, different portions of the permanent population may live under different laws, as in British India the Hindoos, the

[1] See above, pp. 3, 84.

Mahometans and the whites. Since such differences give no footing for the exercise of any foreign authority within the territory, the classes characterised by them must be embraced, as against other states, by the state which assumes the exclusive authority over them: they are not aliens but its nationals.

The tie between a state and its nationals is permanent, not in the sense that it cannot be severed, but in the sense that so long as it continues it exists whether the national is for the moment in the territory of his state or abroad. In the regular course of affairs a state protects its nationals in foreign countries: to examine applications for such protection, and to make the representations which they seem to merit to the territorial government or to the local authorities, is one of the principal duties of diplomatic or consular representatives. But protection outside its boundaries is granted by a state to aliens only in exceptional cases.

One of those exceptions occurs in states of other than European civilisation[1]. "By the laws of Turkey and other Eastern nations," Mr Marcy wrote, "the consulates therein may receive under their protection strangers and sojourners whose religion and social manners do not assimilate with the religion and manners of those countries. The persons thus received become thereby invested with the nationality of the protecting consulate. These consulates and other European establishments in the East are in the constant habit of opening their doors for the reception of such inmates"—this term is ill chosen, as they do not necessarily reside in the consulate—"who are received irrespective of the country of their birth or allegiance. It is not uncommon for them"—the consulates—"to have a very large number of such *protégés*. International law recognises and sanctions the rights acquired by this connection[2]." But the protection thus granted is not that full adoption by a state which is called naturalisation: those who receive it retain their true nationality for all purposes outside the Eastern state in question. A remarkable example of the practice is offered by the protection which France extends to Roman Catholic establishments in the East, irrespective of the true nationality of the persons who may belong to them.

[1] See above, p. 40.

[2] Wharton's *Digest*, § 198.

The existence of the practice is easily understood, for the Eastern state does not perceive of what importance it may be to it to what Western group an individual may choose to attach himself who in any case would be unsuited to its own legal system. But it is an objectionable practice for several reasons. It enables a Western state, by gathering under its flag recruits who have little connection with it, to acquire an influence in the country out of proportion to its trade and to the number of residents really belonging to it; and it impedes the progress of the Eastern state by making it easy for its proper subjects to withdraw themselves from its control.

Another exception, made by the United States, was thus described by Mr Bayard, secretary of state, in a despatch of 5 August 1885. "The criterion...with respect to aliens, who have declared but not lawfully perfected their intention to become citizens of the United States, is very simple. When the party after such declaration evidences his intent to perfect the process of naturalisation by continued residence in the United States as required by law, this government holds that it has a right to remonstrate against any act of the government of original allegiance whereby the perfection of his American citizenship may be prevented by force, and original jurisdiction over the individual reasserted[1]." A memorable and perhaps the first case in which the States extended their protection to such a person, though strictly still an alien, was that of Koszta, a refugee of Austro-Hungarian nationality who had been concerned on the Hungarian side in the war of 1848, qualified by Austria as an insurrection. After he had formally declared his intention to become a citizen of the United States in pursuance of the statute in that behalf, and resided there for nearly two years, he was seized at Smyrna in Turkey by Austrian authorities claiming the right to do so under the capitulations, as the treaties regulating the condition of foreigners in the Ottoman empire are called, between that empire and Austria, and taken on board an Austrian ship of war with the avowed design of carrying him to Austria for punishment. The prompt intervention of a United States ship of war obtained, by threats equivalent to

[1] u. s., § 175.

force, his transfer to the custody of the French consul-general at Smyrna, from which he was released and sent back to the United States, the Austrian government, while agreeing to that course, reserving its right to proceed against him if he returned to Turkey. Koszta had invoked the protection of the United States consul at Smyrna, for which he could assert a claim as well under his incipient relation to that country as under the practice described in the last paragraph; and if the Turkish government was unable or unwilling to prevent the controversy between the two Western powers as to jurisdiction from being decided by force on the Austrian side, it could not object to the counter employment of force on the side of the States. As between Austria and the States, independent of the Eastern practice referred to, Mr Marcy, the secretary of state of the latter, laid down an untenable doctrine. "Foreigners," he wrote on 26 Sep. 1853, "may and often do acquire a domicile in a country, even though they have entered it with the avowed intention not to become naturalised citizens but to return to their native land at some remote and uncertain period; and whenever they acquire a domicile"—as Koszta certainly had done in America—"international law at once impresses upon them the national character of the country of that domicile[1]." The distinction between nationality and domicile, which we shall see in treating of the latter, cannot be thus set aside. But the proceeding in Koszta's case may be defended on the narrower ground afterwards taken in the above quoted despatch of Mr Bayard, on which he was able to distinguish it and the case of Burnato, "who had definitely abandoned Mexican domicile [but] was held for military service in Mexico on the occasion of a transient return," from that of Walsh, who "immediately after his declaration of intention established a commercial domicile in Mexico under circumstances which would have sufficed to disrupt his continued residence in the United States, and prevent his naturalisation under the statute." It would be difficult to deny that the protection of aliens in such cases as those of Koszta and Burnato may be justified as international intervention, but, if it is desired to bring it under general rules, Mr Bayard's

[1] u. s., § 198.

formulation of the necessary exception, though excellent as a guide for the practice of his country, depends too much on the terms of the United States laws on naturalisation to be serviceable as a general statement of international law. As such a statement we are inclined merely to say that an alien may have established such a relation between himself and a given country that the latter may be justified in intervening on his behalf when he is out of it[1].

In connection with the subject of protection afforded abroad, a question arises which is thus put by Hall. "Are the natives of a [colonial] protectorate to be regarded as simple foreigners when in other countries than their own, or can they demand to be placed in the same situation as is accorded to persons whom for one reason or another Great Britain has been in the habit of protecting? Up to the present time," he adds, "they seem to have been relegated to the former category, consistently no doubt with the opinion which has usually been held in England as to the powers acquired by establishing [such] a protectorate[2]." As we have agreed with Hall in arguing for the generality of the authority and jurisdiction enjoyed in a colonial protectorate[3], so we agree with him that "it becomes logically necessary" that its natives shall "share the right to diplomatic protection when occasion for it arises," and that, "if this view be not adopted, the practical inconvenience will make itself felt that natives of foreign [colonial] protectorates will have to receive more favourable treatment in British protected territories than can be conversely demanded." In other words the shadowy distinction between annexation and the acquisition of a colonial protectorate

[1] In Lawrence's *Wheaton*, p. 929, there is quoted a despatch of Secretary Marcy, of 10 January, 1854, refusing protection to Tousig, domiciled but not naturalised in the United States, and distinguishing his case from that of Koszta on the ground that he "voluntarily returned to Austria and placed himself within the reach of her municipal laws." It does not appear whether his return was intended to be transient, like Burnato's, but it appears that the protection was desired against penalties which it was alleged that he had incurred before his emigration, and the right to protect persons in his situation "from arbitrary acts of oppression or deprivation of property" is reserved.

[2] *Foreign Powers and Jurisdiction of the British Crown*, § 100.

[3] Above, pp. 125–7.

will not warrant the natives of the latter being treated, for the purpose of protection abroad, otherwise than as nationals. A protected state has its own nationals, and their protection outside its territory will depend on the terms existing between it and the state on which it is dependent. Those terms, by allowing to it diplomatic intercourse although under the control of the superior, may leave it capable of making for itself the necessary representations, or, by vesting the conduct of all its foreign relations in the superior, may require the latter to step forward on its behalf and that of its nationals[1].

Domicile.

The classification of a population as composed of nationals and aliens is not the only one that can be made with some bearing on international law. Another classification is that into residents and others, and this again may be varied according to the degree of fixity or permanence which a residence must present in order that it may be treated as such for a given purpose of law or administration. A very transient residence will suffice in order that the banns for a person's marriage may be published with full effect. A closer connection with a place may be required in order that the summons of a court of justice may be properly served at a person's dwelling when he is himself inaccessible. And so there may be an ascending scale of fixity of residence until we reach that which can be reasonably accepted as determining personal law and status in private matters, that is, as determining the territory with the society and habits of which a person is most closely identified, and the law of which ought therefore to govern, for example, the age of his majority and his power to dispose of his property by will. Residence of this last degree of fixity, when defined with the care necessary for a technical term, is called domicile. Thus there arises a classification cutting across that of nationals and aliens, there being in every country many aliens the character of whose residence stamps them as domiciled in it, while these, if they happen to be for a transient purpose in the country of

[1] See above, p. 22.

their nationality, will not be domiciled in it although its nationals. We said that the residence which is domicile can be reasonably accepted as determining the law of capacity and status, and in most European countries domicile has been actually used, at some period or other of their legal history, as the criterion in those matters, though often with exceptions preventing the capacity or status conferred by a foreign law from affecting the title to real or immovable property. But on the continent of Europe nationality has by many legislations been substituted for domicile for that purpose, the example having been set by France in the Code Napoleon, and followed by the Italian and German codes[1]. In England and the United States on the contrary nationality has not been introduced as a criterion for the law applicable in private matters, and in England the importance of the law of a person's domicile has even been increased by its adoption, with exceptions as to real property, for cases which our older practice referred to other laws, as for example that of the place of contract. Indeed in the British empire and the United States nationality would not furnish a complete criterion, because there are different systems of private law or of administration in the three parts of the United Kingdom and in its various colonies and dependencies, and so also there are in the various so-called states which compose the Union. Domicile therefore is the only possible criterion of a person's being an Englishman or a Scotchman, a Marylander or a Louisianian. If it was agreed that his nationality should prevent a British subject or a United States citizen from falling under the private law of Germany or Italy in consequence of his being domiciled there, recourse to the domicile of his ancestors or to his own original domicile would still be necessary as an ancillary criterion, for determining under which of all British or United States systems of private law he should fall. Of course what has been said of the British empire and the United States will equally apply to any state of

[1] We can here speak only in very broad terms of a matter so little connected with public international law, and we must therefore refer the reader to the different legislations for the limitations with which the general principle has been guarded, in favour of persons contracting with foreigners in *bona fide* ignorance of their want of capacity.

international law which comprises territories possessing different systems of private law or of administration.

Thus viewing domicile in its actual relation to personal law in private matters, one is led to ask how it can ever have been thought to govern the political relation of nationality, as we have seen Secretary Marcy asserting that it does. The answer must be found in history. In the middle ages, through the feudal system and the privileges acquired by the cities, the greatest political aggregates on the continent, as the Holy Roman Empire of the Germans and the kingdom of France, were split up into provinces and municipalities which occupied a larger space in the daily life and thoughts of their inhabitants than did the aggregates to which they belonged. The modern state did not exist, and powers which exclusively belong to it, as those of peace and war, were exercised by the lords and the cities as well as by the sovereigns to whom in the last resort they owed allegiance. To express the ideas, then floating and rudimentary, from the fixing and development of which the state has grown, the only available terminology was that of empire or kingdom on the one hand and nation on the other hand, and the name of nation was constantly applied to the people of a province. At the same time the smaller units had their customs and statutes relating to private law and their separate jurisdictions, and domicile, which in the Roman empire had been the leading test for holding that a defendant was amenable to the court of a given judge, was still handed down for that purpose. Thus nationality and domicile came to be often treated as equivalent terms, but as the state grew, the question of its membership became disentangled from private law, to rest first on the place of birth, which under feudal principles had been the leading test of allegiance, and later, as Roman principles of jurisprudence became more influential, on parentage.

In one department, however, of international law domicile has continued to be important, namely that which relates to the capture of private property at sea by a belligerent. The British and United States rule as to this still is that property is regarded as enemy or neutral according to the territory in which the merchant or the house of business owning it is established, although in France the question of enemy or neutral

is decided by national character. The Anglo-American view is defended on the ground that industry and commerce add to the strength of the country in which they are carried on, but it can scarcely be doubted that it is in some degree referable to the fact that in England the admiralty judges have usually been also the judges in probate and matrimonial matters, accustomed in the latter capacity to apply domicile as a criterion, and to rely on old jurists in whose language domicile and nationality were confounded. Of course the present judges, both in England and in the United States, are free from any such confusion of ideas, but they hold themselves bound to follow the established practice of their countries; and Secretary Marcy, in his turn, must have been influenced by what he found in the reported admiralty cases. For the rest, it must be remarked here, though the place for developing the remark will be found in discussing the laws of war, that the trade domicile which the Anglo-American practice upholds as the test for belligerent capture has come to differ more or less from the domicile which is now maintained in England as the criterion of personal status. The fixity of residence necessary for the latter has been wrought up to a higher degree by the decisions of the English courts during the last half century, during which there has been little opportunity for a British prize court to review the doctrine of trade domicile in war; and since the utility to a country of the industry and commerce carried on in it, which is the practical ground for that doctrine, depends more on the actual seat of an occupation than on its probable fixity, we may expect that a British prize court, when the opportunity shall again be given, will not follow the new tendency as to domicile in peace.

Control over Nationals abroad.

Since the tie between a state and its nationals is a personal one, it is not broken by geographical distance. If any of the nationals transport themselves to a region of the earth not yet annexed by any state of international law, whether they do so for the purpose of commerce or as settlers, their state may follow them with its authority and annex the region or establish a colonial protectorate over it. Their acquisitions are their own

as to property, but not, at least at first, as to sovereignty. If they set up a state and aspire to independence, their home state can treat their proceeding as illicit and substitute its own authority for that of the new organisation, unless it has left them to struggle unaided against the dangers and difficulties of the situation until they have consolidated a power sufficient for the maintenance of civilised life and order. In that case, since the duty of allegiance and the right to protection are correlative, the right to allegiance would be lost by the omission to give protection. The claim to the continuance of sovereignty under a national law would be met by a claim to recognition and independence under the principle of justice as a branch of the moral law, and the controversy would have to be judged in conscience by the parties to it. We have spoken of recognition of insurgents as a new state, as a question between the old government and third states[1]. As a question between the old government and its subjects, whether emigrants or insurgents on old soil, it is not one of international law. These principles have been largely illustrated in Africa. A great part of the colonisation of that continent, especially by Great Britain and Germany, has taken place by the extension of state authority over regions in which settlers of the respective European nationalities had previously established themselves. An extreme instance of the right was given when Great Britain followed in arms the Boers who had trekked inland across the frontier of the Cape Colony. She ultimately recognised their independence, for the Transvaal by the Sand River convention in 1852 and for the Orange Free State by the convention of Bloemfontein in 1854; whether soon enough for justice must be a matter of opinion, in which the danger to the colony from any excitement of the natives outside it must be taken into account.

When the nationals of one state are in the territory of another, whether resident there or for a transient purpose, the authority of the former over them can still be exercised, not by action on the foreign soil, for any such action would be a usurpation of the territorial sovereignty over that soil, but by enacting penalties to be enforced on the return of the culprits to

[1] Above, p. 57.

its own territory, or fines to be levied from the property which they may have there. For states in which military service is compulsory, one of the most obvious applications of this is to securing the return of absentees in order to their performing such service. Another application is to the punishment of crime committed abroad. Thus "Russia, many of the German states, Italy, Austria, some of the Swiss cantons and Norway enforce their domestic criminal law against all of their subjects who have committed offences abroad either against the state itself, their fellow subjects, or foreign subjects[1]." Great Britain punishes its subjects who commit abroad treason, misprision or concealment of treason, murder, manslaughter, bigamy, offences against the acts prohibiting the slave trade or the Foreign Enlistment Act, and perhaps one or two others of smaller importance. Also offences against property or person committed at any place, ashore or afloat, out of the king's dominions, by any master, seaman or apprentice, who at the time when the offence was committed or within three months previously has been employed in any British ship, subject the offender to trial and punishment in England—an enactment which comprises offences committed outside the limits of British authority, whether on land or on shipboard, not only by subjects but by foreigners deriving a tinge of British character from recent employment on a British ship[2].

Admission of Aliens to the Territory.

Between states of the white race, the entire exclusion of the subjects of any from the territory of any other at peace with the former has scarcely been attempted within historical times. If such an attempt could be imagined, it would be defeated by the stipulations in favour of mutual intercourse usual in the network of commercial treaties by which the white world is bound together, and which may be taken as expressing a general sentiment requiring that free intercourse shall be the rule. But those stipulations are vague, and are not understood to prevent the exclusion of individuals or even of classes for special reasons.

[1] Taylor, § 194.

[2] Merchant Shipping Act 1894, s. 687.

The power to exclude individuals deemed undesirable is assumed in the passport system, once universal on the continent of Europe and still far from extinct; and the power to exclude classes is assumed in the legislative exclusion of pauper aliens or of aliens arriving under contracts for employment, of which the United States furnish an example, and the adoption of which system so far as concerns the former class is urged by many in England, without its being suggested that in either country it is or would be a violation of international duty towards the states from which such aliens might come.

Thus a clause providing for free intercourse in the common form of commercial treaties would scarcely seem sufficient to compel a state which regarded Jews as a special and inferior class to receive them from a country in which they enjoy the full rights of citizenship. The objection made by the British government to the laws impeding the immigration and facilitating the expulsion of aliens, which were passed by the South African Republic before the war and the annexation of the Transvaal, was not based on any general international doctrine but on the interpretation of the convention of London.

As between states of the white race and orientals, the former, though long contented with the seclusion of their subjects in factories, as that of the Dutch at Nagasaki in Japan, have for the better part of a century past demanded freer admission for them. Probably that demand has in no case been presented as sufficient to justify war if refused, but although the various wars of this country with China have been commenced on other grounds, a fresh stage in the facility of admission has always been insisted on as one of the conditions of peace, and the rights so conceded have always been freely extended to other white powers. On the other hand the United States and the Australasian colonies of Great Britain have directed against the yellow races legislation which, being based on the national character of the immigrants, cannot be compared with such special exclusions as those of Jews, paupers or persons under contract for employment. The practice is therefore very unequal as between the great divisions of mankind, nor, since Japan has been admitted to the full communion of international rights, can the inequality be explained as a consequence of the fact that

international law has only a partial application between states of European and of other civilisation. We must admit that notwithstanding the general sentiment above referred to as existing within the white world, international law knows as yet no right independent of treaty, not even an imperfect right on which a claim to a suitable treaty might be founded, for the subjects of one state to be allowed, even with the exception of special cases, to travel, reside or trade in the territory of another.

So far as the exclusion of aliens from its territory is within the discretion of a state, it is free to exercise its discretion by expelling those already resident as well as by declining to admit them in the first instance. In most countries the power of expulsion is left to the executive department of the government, which habitually exercises it for purposes of police, subject to the restraint of opinion, which, as is natural, appears to operate more strongly against the expulsion of persons already allowed to reside than against an initial refusal of admission. Thus many conventions stipulate that expulsion shall only take place for grave causes, that the person expelled shall have the opportunity of clearing himself from accusations or suspicions, and that his state shall be notified[1]. Where the executive has the power of expulsion, the extradition of criminals is effected by an exercise of it, the officers of his own state being in readiness to receive the expelled alien at the frontier. In the United Kingdom however the executive has no such power unless expressly given to it by the legislature, as it often is by Alien Acts passed in time of war or of internal difficulty, and by the Extradition Acts, which apply when under the authority given by them the executive has concluded treaties with foreign states. Even to executives which possess the power such treaties are of value for securing reciprocity in its exercise, and for protecting them by a definition of the cases for extradition from the imputation of arbitrary conduct. The technical treatises on the subject must be referred to for the details connected with extradition. It is sufficient to notice here that a universal sentiment in western and central Europe forbids its being employed for political offences.

[1] Despagnet, § 348.

Treatment of Aliens in the Territory.

Although as between states of the white race the admission of aliens to travel, reside and trade, except in special cases, is general, they are with equal generality refused political rights, as that of voting at elections, whether parliamentary or municipal, and of exercising public functions. In England, by an act of parliament passed in 1701 (st. 12 and 13 Wm 3, c. 2) no alien is capable of any office or place of trust either civil or military. But this did not interfere with the old practice of forming juries *de medietate linguæ* for the trial of aliens, and now, by the Juries Act 1870, s. 8, aliens after ten years' residence are capable of service on juries and liable to it.

As to military services, we adhere to the principles laid down by Hall, which as he has shown are in accordance with the stipulations contained in a very large number of commercial treaties, so far as those stipulations extend. (1) "It is not permissible to enrol aliens, except with their own consent, in a force intended to be used for ordinary national or political objects. (2) Aliens may be compelled to help to maintain social order, provided that the action required of them does not overstep the limits of police as distinguished from political action. (3) They may be compelled to defend the country against an external enemy when the existence of social order or of the population itself is threatened, when, in other words, a state or part of it is threatened by an invasion of savages or uncivilised nations[1]." The convention of 1862 between France

[1] § 61. During the civil war in the United States Lord Clarendon seemed to go a little beyond this, admitting that "British subjects voluntarily domiciled in a foreign country" might be liable to service "even, to a limited extent, for the defence of the territory from foreign invasion." Instructions to Lord Lyons, *ib.*, and in the appendix to the report of the Naturalisation Commission, p. 42. Perhaps however, by saying "to a limited extent," he meant no more than to reserve the case of an invasion by savages as distinct from a political invasion. Bluntschli (*Droit International Codifié*, § 391) requires the service of aliens only "to defend a locality against brigands or savages," and mentions (as does Despagnet, § 354) that foreign governments protested to the Government of National Defence against their subjects in Paris during the siege being

and Spain, by which Spaniards born in France and Frenchmen born in Spain are made subject to military service unless they prove that they have satisfied that obligation in their own country, is represented by Despagnet as being merely a measure of mutual assistance for preventing military service being evaded to the prejudice of both armies. And he quotes with approval the blockade of the river Plate by France in 1838 and France and England in 1846, provoked by the attempt of the Argentine republic to impose on aliens the duty of serving in the army—the protest of England against British subjects being compelled to serve in the American civil war—and the abandonment by Belgium, in compliance with the protests of the powers, of her law of 1897 imposing on aliens service in the civic guard[1]. If compulsory enrolment in a civic guard or militia were allowed, although some of the purposes for which such a force may be employed might fall within the duties of foreigners, it would be impossible adequately to protect them from the exaction of services going beyond those duties.

Aliens are subject to taxation equally with nationals, and in other respects their assimilation to the latter has made great progress. The *droit d'aubaine* to which they were subject in France, and by which they were incapable of receiving or transmitting the succession to any property, movable or immovable, after early receiving some relaxation was finally abolished at the Revolution[2]. The incapacity of aliens to hold real estate was abolished in England by the Naturalisation Act 1870, but still subsists in a few countries, notably in some of the United States. And with one or two other less important exceptions of a similar character, such as their incapacity by the laws of some countries, and notably of the United Kingdom, to hold shares in ships, aliens are now allowed to acquire and enjoy all private rights.

compelled to take arms or to serve in the national guard. If ever the personal aid of aliens against a civilised enemy could be demanded, the defence of a besieged city would seem to present the strongest case.

[1] § 354.

[2] See Demangeat's *Histoire de la Condition Civile des Étrangers en France.*

Who are Nationals: Jus soli and jus sanguinis.

Historically, nationality arose out of allegiance. The sovereign lords in the dealings between whom international law had its origin belonged to a system of which the dominant character was feudal, and in feudalism the personal relation of a man to his lord was blended with the territorial relation of a fief to the lordship of which it was held[1]. By virtue of the latter the personal relation to the lord was imposed on all natives of the fief, or of the country considered as a collection of fiefs, and this *jus soli* was not inconvenient because few persons were to be met with in any country who had not been born in it except traders and other obviously casual visitors. It was therefore on birth on the soil, or on certain circumstances equivalent to birth on the soil, that the character of a natural-born subject primarily depended. By the common law of England, which fairly represents the old common law of western and central Europe on the matter, allegiance was due to the king from all persons born on land within his dominions with the exceptions presently to be mentioned, or in foreign harbours on board an English ship of war or packet enjoying the immunities of a ship of war, or at sea on board an English ship; and from children born abroad to a duly accredited English ambassador or minister[2], but not from children born on foreign

[1] It seems that sovereign is derived from *supra* and suzerain from *sursum*; that *seigneur souverain* and *seigneur suzerain* were at first used indifferently for lord paramount, with *arrière vassal* for their correlative; that about the beginning or middle of the sixteenth century *souverain* was restricted to describe the king; that *suzerain*, thus become distinguished from *souverain*, came to be used as a substantive, without the addition of *seigneur*, to denote an immediate lord with *vassal* as correlative; and that *suzeraineté* is not used before the nineteenth century to express any other than feudal relations, its employment to translate the Turkish word found in the old capitulations granted to the Danubian principalities not being really an exception, since there was a close resemblance between Turkish and western feudalism. The previous investigators of the history of these terms are referred to by Boghitchévitch (*Halbsouveränität*, pp. 87—90), whose conclusions we give.

[2] "If any of the king's ambassadors in foreign nations have children there of their wives being Englishwomen, by the common laws of England they are natural-born subjects": in *Calvin's Case*, 7 Coke 18 a. The

soil to English soldiers or sailors, though the fathers were engaged in foreign and friendly countries on the king's service[1], or merely born within the area of an English legation. The exceptional cases referred to, in which the character of a natural-born subject was not conferred by birth on English soil, were two. One, that of children born to foreign ambassadors duly accredited to the king, corresponded to the claim in favour of the children of similar English functionaries. The other was that of children born to enemy fathers at places in hostile possession, and to this a claim in favour of the children of English soldiers or sailors in analogous circumstances may have corresponded, though not distinctly traceable[2]. All those comprised by these rules as natural-born subjects were said to be born within the king's allegiance.

It was however impossible that the *jus soli* could be permanently maintained as the sole rule for determining allegiance, when the growth of order and the improvement of communications led to men being oftener accompanied in foreign travel and residence by their wives, and consequently to children being oftener born in countries not their true homes. Hence another source of allegiance was introduced, the *jus sanguinis*, descent or parentage. This is often described as a Roman principle, and so in truth it is, but in a way which requires some explanation. The personal condition of a citizen possessing the full franchise (*civis Romanus*), that of one possessing the inferior or Latin franchise (*Latinus*), that of a slave (*servus*), and that of one who was none of the foregoing (*peregrinus*), were all hereditary. If the person in question was the issue of free parents united by a lawful marriage, his condition was that of his father; otherwise, it was that of his mother; the place of his birth was unimportant in either case. And since any one

condition that the wives are Englishwomen is certainly now superfluous, and it is doubtful whether it was necessary even in Coke's time: *Bacon* v. *Bacon*, Cro. Car. 601.

[1] *De Geer* v. *Stone*, 22 Ch. D. 243.

[2] "If enemies should come into any of the king's dominions and surprise any castle or fort, and possess the same by hostility and have issue there, that issue is no subject to the king though he was born within his dominions, for that he was not born within the king's ligeance or allegiance": in *Calvin's Case*, 7 Coke 18 a.

who belonged to the Roman state had one or other of the above conditions, it may be said that membership of the Roman state depended on parentage. But there was no technical term for that relation to Rome which in the case of a modern state is expressed as being a member or subject of it, for in early times the Romans had no conception of any more comprehensive state than the body of citizens, and in later times, when the conception certainly existed, the narrow technical phraseology was not duly enlarged. Free men who were alien to the body of citizens being *peregrini*, the plebeians shared that name till they acquired the franchise, and through the natural persistency of language that name was sometimes given even later to them, as well as to the free provincials who were neither *cives Romani* nor *Latini*. Finally, the subjects of the empire of all classes and aliens to it were popularly distinguished as *Romani* and *barbari*, but these were not terms of law, and so it is impossible to quote any simple Roman authority for the *jus sanguinis* governing what we now know as nationality. But the whole trend of Roman thought favoured the hereditary character of personal condition, and such was the rule for each of the particular conditions mentioned above. There was also *origo*, the tie which bound the *civis* or *municeps* of any *civitas* or *respublica* within the empire to submit to its jurisdiction and bear his part of its municipal burdens. This too was hereditary, and so far as any direct filiation can be traced or surmised between Roman practice and the modern view of parentage as a source of nationality, it is probable that the line along which we should look is rather that which leads upwards from the latter to *origo*, through the remains of ancient jurisdiction, than any pointing to the public character of a *civis Romanus*.

As a matter of clear history, the way in which the *jus sanguinis* was introduced into the European law of nationality by the side of the *jus soli* was not that of allowing the character resulting from either to be disclaimed because it conflicted with that resulting from the other. The *jus sanguinis* makes its appearance as enlarging not the choice of the individual but the grasp of the state. A nationality dependent on parentage is imposed, doubtless not without the design of safeguarding the individual from being an alien in his father's

country because he happened to be born abroad, but without reference to the attitude which the country where he was born might assume towards him, important as that might be to him. In the United Kingdom the British character was given by st. 7 Anne, c. 5, s. 3, interpreted and substantially repeated by st. 4 Geo. 2, c. 21, s. 1, to the first generation born out of the allegiance: the father of the child born abroad must not at the date of the birth be attainted of high treason, be liable to the penalties of high treason or felony in case of his returning to the kingdom without the king's license[1], or be in the actual service of any foreign prince or state in enmity with the crown. Then the st. 13 Geo. 3, c. 21, extended the character of natural-born subjects to children born out of the allegiance to fathers made natural-born subjects by the previous enactment, so that now British nationality belongs by the *jus sanguinis* to the second but not to any remoter generation. In France, in the latter days before the Revolution, the system of Pothier was established in practice: it gave French nationality not only to every child born in France, but also to the child born abroad of French parentage through males to any number of generations[2].

It was probably the Code Napoleon that set the first example of allowing an option to the person concerned, and it did so by fixing the presumption in favour of the *jus sanguinis* while allowing French nationality to be claimed by an option in favour of the *jus soli.* In the preparatory discussions on that code it was said that a child born in France to a foreign father was not attached to France by feudalism, which did not exist in the republic, or by intention, which a child could not have, or by residence unless he remained: therefore Art. 9 gave him a year from his majority in which to claim French nationality, on condition of declaring his intention to fix his domicile in France, and establishing it there within a year from the declara-

[1] This only applies to the case where the penalties would be incurred by and for the return, not to that where the return might make it possible to enforce the penalties incurred for some other fact: *Fitch* v. *Weber,* 6 Hare 51.

[2] Cogordan, *La Nationalité au point de vue des rapports Internationaux,* p. 23. The learned author says *né à l'étranger de parents français,* but it may be presumed that only the fathers were considered.

tion if not already residing there. At the same time Art. 10 declared that every person born abroad to a French father is French.

The principle of option, once introduced, came to be admitted by many states when operating for the disclaimer of their nationality as well as in favour of it. Thus, for the United Kingdom, the Naturalisation Act, 1870, s. 4, provides that a declaration of alienage may be made by any person who by reason of his having been born within H.M.'s dominions is a natural-born subject, but who also at the time of his birth became under the law of any foreign state a subject of such state and is still such subject, and by any person who was born out of H.M.'s dominions to a father being a British subject—his being under foreign subjection not being required in the latter case, a difference of which the reason is not obvious, since he may have been born in a country in which that accident will give him no right to its nationality—and he will thenceforward cease to be a British subject. He must be of full age, which, since only the loss of British and not the acquirement of foreign nationality is concerned, must mean the age of twenty-one years required by British law; and the right of declaration is not given to married women (s. 17), the British principle being that a married woman is bound to have her husband's nationality.

From the time of the Code Napoleon and under the influence of the new ideas which guided it the *jus soli* fell into disuse on the continent as the base of nationality. But the adoption of the *jus sanguinis* to any number of generations born abroad, with or without an option in favour of the *jus soli* but without its imposition, led to the existence of a class of persons practically without nationality, not reckoned as subjects by the country of their birth, notwithstanding the long residence of their ancestors on its soil, and whose subjection to the country of their parentage has through the long absence of the same ancestors become scarcely more than theoretical[1]. This was inconvenient in many ways, and especially as such *sans patrie*,

[1] Where the parentage is British, the third and subsequent generations born abroad are even theoretically without nationality unless birth on a given soil confers it on them.

heimathlosen, formed a large population exempt from the military service of the only country in a position to exact it from them, and to which by their establishment in it they were morally bound to render it. A reaction was begun in France by laws of 1851 and 1874, and culminated in the substitution of new Articles 8, 9 and 10 of the Code by laws of 1889 and 1893. As those articles now stand French nationality belongs by birth to all persons born anywhere to French fathers—to all persons born in France to foreign parents of whom one was born in France; but if only the mother was born in France, the person may decline French nationality during the year following his full age by French law (21 years), proving at the same time by official certificates that he has preserved the nationality of his parents and has submitted to perform his military duty in his country—to all persons born in France to foreign fathers and domiciled in France at the time of attaining their full age by French law, unless the person declines French nationality under the conditions mentioned in the preceding case—and to all persons born in France to foreign fathers and not domiciled in France at the time of attaining their full age by French law, if within a year from that time they undertake to fix their domicile in France, establish it there within a year from that undertaking, and claim French nationality by a declaration registered at the ministry of justice, to which however effect may be refused for unworthiness by an administrative judgment; and this may be done for minors in the same case by their fathers, surviving mothers, or guardians duly authorised, while if they submit to military service they will become French. The reaction against the *sans patrie* by giving more importance to birth on the soil has extended to some other countries, notably to Sweden as shown by a law of 1 October 1894.

In America there has not been the same tendency to adopt the *jus sanguinis* as in Europe, because the states of that continent have to deal with, and even invite, a great immigration which they cannot safely allow to remain alien, nor do they like to clog the advantages which they offer to immigrants with a necessity for the children born after their arrival to opt or be naturalised. But their maintenance of the *jus soli* has involved several of the Spanish American states in controversies with

European powers about the liability to military service of persons born on the soil to fathers not naturalised. They have in general refused to show forbearance on that point, and Spain in her treaties with them has been obliged reluctantly to admit their practice, while France, by a ministerial circular of 16 June 1873 to her representatives, has refused to protect those who will not perform their military service in France, which furnishes a sufficient practical answer to claims by the sons of French emigrants. England, maintaining her own claim on those born on her soil, is of course in no position to ask for forbearance in South America[1].

In the United States the relation of a citizen to the Union was at first founded on his being a citizen of one of the component states, but this was altered by section 1992 of the revised statutes, enacted in 1866, and the fourteenth amendment of the constitution, ratified in 1868. By the former, "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States." By the latter, "all persons born or naturalised in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state in which they reside." There was thus introduced an independent citizenship of the United States, the persons possessing it being distributed among the several states by residence, just as the subjects of the United Kingdom are distributed among the British dominions by domicile[2]. The conditions for possessing this citizenship are to be found in the legislation which introduced it, which it will be observed incorporates the English common-law doctrine of the *jus soli*, handed on to the Union through the states, modified however by a declaration of congress in 1868 that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the right of life, liberty and the pursuit of happiness." The true conclusions from these data appear to be that when the father has domiciled himself in the Union he has exercised the right of expatriation claimed for him by congress, and that his children afterwards born there are not subject to any foreign

[1] See Cogordan, pp. 37—47.

[2] See above, p. 204.

power within the meaning of section 1992 but are subject to the jurisdiction of the United States within the meaning of the fourteenth amendment, therefore are citizens; but that when the father at the time of the birth is in the Union for a transient purpose his children born within it have his nationality, and probably without being allowed an option in favour of that of the United States. And these conclusions appear to be in accordance with the practice of the United States executive department[1].

With the general view which has thus been given of the parts played in the modern world by the *jus soli* and the *jus sanguinis* we must be content in a work like the present. The exceptions to one or the other principle which most states have made in order to meet practical exigencies, and which are especially liable to be varied by new legislation, present so complicated a mass of material that those who desire to know how the case stands in a given country at a given moment must be referred to the special sources of information. We believe however that Germany, Austria, Hungary, Norway, Denmark, Switzerland, Servia, Roumania, and Salvador maintain the *jus sanguinis* without qualification, claiming as theirs the children of their subjects wherever born, and allowing to birth on their soil no influence on the nationality of the children of foreign parents, and that there are few or no other states equally uncompromising in their attachment to either principle.

[1] See 2 Wharton's *Digest*, § 183. The option mentioned in the text is faintly suggested in Mr Bayard's despatch of 24 July 1886, with the proviso that the election, if such there may be, "must be made on attaining majority or shortly afterwards, and must be signified by acts plainly expressive of intention, such as immediate preparations to return to the elected country." But Mr Frelinghuysen, in his despatch of 15 January 1885, says that "the citizenship of a person so born [in the United States to a foreign father] is to be acquired in some legitimate manner through the operation of statute"; which points to naturalisation as the only remedy. Dr Taylor quotes unpublished despatches of Mr Evarts, 10 Feb. 1880, and 12 Nov. 1880, to the effect that "a person born here, although he was immediately carried abroad by his parents, has the right to elect the nationality of the United States when he arrives at full age": § 178.

Single or Double Nationality and Conflict of Nationalities.

From what has been said it sufficiently appears that the same person may be claimed as its subject by the country in which he was born on the ground of the *jus soli* and by that of which his father was a subject on the ground of the *jus sanguinis*, that the laws of those countries may not have allowed him options by the exercise of which he could acquire the same nationality in the view of both, and that if such options were allowed him he may not have exercised them; to which we may add that the options, if allowed and exercised, may not all by the laws which give them have a retroactive effect, curing the conflict as from the person's birth. To this already ample material for conflicts between states as to the nationality of given persons, we shall see that additions are made by the varying rules as to naturalisation and expatriation, and as to the connection between the nationality of wives and children and that of their husbands or parents. The conflict may arise either in a court of law or for the consideration of the executive government, but there will be this difference between the cases, that a court of law is bound by law while an executive has a certain discretion in the performance of its functions, whether granting or refusing protection or a passport, extending the prerogative of mercy to a convicted criminal, or any other. The law applied by a court will be that of its own country, subject to admitting the effects of foreign laws in accordance with the principles on that subject, to which in this treatise we can only make the most necessary and brief allusions. If for instance a man, claimed as a national both by the United Kingdom and by another country, should contract in the latter a marriage permitted by its law to its subjects, an English court would have to accept him as a married man. But in appreciating what he should do in British dominions an English court would regard only his British nationality, though the executive might be lenient[1]. It is into a conflict of this kind that every

[1] Aeneas Macdonald was a Scotchman carried to France in his early infancy, and resided there till he came over and took part in the rebellion of 1745 under a French commission, the two countries being then at war.

case of double nationality resolves itself. Claims to the same person exist on the part of different states; each of those claims asserts for him a single nationality, namely its own; and each escapes the difficulty either by a personal concession or by recognising on principles of jurisprudence the effects which the other claim has produced. This is the measure of truth contained in the answer made in 1848 by M. Crémieux, the French minister of justice, to Lord Brougham, who asked for naturalisation in France on the terms of not putting forward in that country his character of a British subject. *La France*, he said, *n'admet pas de partage, elle n'admet pas qu'un citoyen Français soit en même temps citoyen d'un autre pays. Pour devenir Français il faut que vous cessiez d'être Anglais.* So far the minister correctly expressed the singleness of nationality which international law upholds in principle, and the unreserved acceptance of that principle which is expected from every candidate for naturalisation. But when he went on to say—*vous ne pouvez être Anglais en Angleterre, Français en France: nos lois s'y opposent et il faut nécessairement opter*—his language must be taken with the qualification that, so long as states omit to arrange their claims to the nationality of persons in such manner that they can never conflict, it must remain to some extent possible to be in fact British in England and French in France[1].

He was convicted of high treason but pardoned on conditions: 18 *State Trials* 857. The result would hardly have been different had he been formally naturalised in France, having regard to the restriction for the case of return to one's original country which we shall see accompanies naturalisation.

[1] Double allegiance was familiar as a fact under the feudal system, since a man might hold fiefs under two or more sovereigns, or hold a fief under one sovereign and have been born in the dominions of another, but theoretically each sovereign held his own claim as high as if no other existed. So too when the Danish minister of foreign affairs wrote to the British representative at Copenhagen, 28 May 1863, with reference to a British subject who had taken the burgher's oath in a town of Zealand—*notre législation ne s'oppose pas à ce que la coexistence de deux nationalités puisse être admise dans la personne du même individu, seulement en principe sa qualité d'étranger ne doit porter aucune atteinte à l'accomplissement des devoirs auxquels il est astreint comme sujet Danois*—he seems to us to have referred only to the same discrepancy between principle and fact.

In the actual condition of things it would seem that international trouble can only be avoided by an understanding of which there is a close approximation to a general acceptance, namely that, in cases not provided for by treaty, no state shall extend its protection to its nationals residing in the territory of another state which claims them as its own nationals by any title known in the civilised world, whether *jus soli*, *jus sanguinis* or naturalisation. And the statement might well be extended to the case of a person's being transiently present in the territory of a state which claims him, were it not that transient presence may in some instances be capable of an explanation that would justify some intercession, though even then rather as a plea addressed to a friendly power than as questioning the right of a state to apply its own laws on its own territory. Where the conflict is that between the two first mentioned titles, the claim to protect is usually made from the side of the *jus sanguinis*, and forbearance may the more reasonably be expected from that side inasmuch as the *jus soli* is the older principle, if not in the history of the world, at least in the modern relations out of which international law has arisen. We have seen that France and Spain have practically conceded the point to the South American republics, and so does Great Britain in the case of persons falling within her laws which confer the British character on the first two generations of persons born abroad of British male descent[1]. Where the conflict arises from the return of a

Therefore, with all deference to the great authority of M. Cogordan, we cannot agree with the remark by which he follows the above quotation, made by him from the *Appendix to the Report of the Royal Commission on Naturalisation and Allegiance*, 1869, p. 66—*une doctrine absolument différente a prévalu en France* (*La Nationalité*, p. 14). France can no more escape from the fact than any other country, and the difference between the Danish statesman's doctrine and that of M. Crémieux appears to us to be one of words only. In the case of a federal union (see above, p. 35), a subject may owe allegiance at the same time to the union and to one of the federated states, and this has been presented as a case of double nationality. It is however not such in the sense in which we use the term, but a case of divided duties, all the duties of a subject being owed to one or other of the superiors according to the details of the tie between them, but none to both.

[1] As to France and Spain, see above, p. 219. As to Great Britain, see the despatches of Lord Clarendon, 24 Dec. 1857, and of Lord Malmesbury,

naturalised person to his original country which has not consented to his expatriation, that is to his loss of its nationality, the power which has naturalised him is pointed out as the one to show forbearance by the fact that it has made the conflict possible by its own act. It is accordingly a constant part of international practice in Europe not to grant protection in such a case, although it would be granted to the same person while in third countries[1]; and some states even refuse the naturalisation without proof that the applicant's former state consents to his expatriation. In the United States the matter is presented in a somewhat different aspect, partly by their assertion of expatriation as a universal right, and partly by the frequency, proportioned to the vast number of immigrants whom they receive, of transient returns of such immigrants to their former homes for purposes of business or of family, and of their being there called on to perform military service. The doctrine which ultimately governed the conduct of the United States executive was that such persons were to be protected against the exaction of what at the time of emigration was merely a future liability to serve; that to lose protection the emigrant must have done that for which he might have been tried and punished at the moment of his departure. And this has been practically accepted by France, while in Germany the matter is regulated by the treaty of 22 Feb. 1868 concluded by the United States with the North German Confederation, by which naturalisation combined with five years' residence in either is fully recognised by the other, subject, in case of the emigrant's return to his old country, to his punishment for offences committed before his emigration if prescription does not prevent; and subject to provisions that his fixing his domicile in the old country shall be deemed a renunciation of his naturalisation in the new, and that his living in the old country for more than two years may

13 March 1858, to Lord Cowley: *Report of the Naturalisation Commission, Appendix*, p. 67, and Cockburn's *Nationality*, p. 109. The former despatch adds justly that the persons in question would not be British subjects within the true meaning of a treaty concluded with their original state.

[1] The reasoning in the despatches quoted in the last note covers the case of British nationality conferred by naturalisation as well as that of its being conferred by statute.

be deemed to imply the absence of an intention to return to the new. Between the United States and Great Britain, which have not to consider the liability to military service, the matter is regulated by the convention of 13 May 1870, by which naturalisation in either is to be valid in all respects and for all purposes immediately on its completion, but if the emigrant shall renew his residence in his old country he may be readmitted to his old nationality on his application and on such conditions as the readmitting government may impose, and shall not be further claimed by the other government. The Naturalisation Act 1870 contains the provisions of British law necessary for giving effect to the convention.

Naturalisation and Expatriation.

Much of what had to be said about naturalisation has been now said, and with reason, because it is impossible to make the precise meaning of naturalisation clear without first, on the one hand, dispelling the notion that in principle and in the eye of the law of each state nationality can be any thing else than single, and on the other hand showing that, until all states adopt uniform rules for nationality, they cannot in practice extend equal protection to all whom their respective laws claim as nationals. This having been done, we may say that naturalisation is conferring the nationality of a state on an alien, the protection which he is thenceforward to receive from his new country outside its limits being that which in its practice is given in cases of the conflict of nationalities, and his rights within his new country being subject to any restrictive legislation existing in it. Examples of such restrictions are that of the presidency of the United States to natural-born citizens, and those in the British act of parliament of 1844[1], under which a naturalised person could not be a member of the privy council or of either house of parliament, and was also subject to any other restriction which the secretary of state might think fit to impose by his certificate of naturalisation. The power so conferred on the executive came to be exercised by excepting in

[1] St. 7 and 8 Vict., c. 66.

the certificate "any rights and capacities of a natural-born British subject out of and beyond the dominions of the British crown," and this in a Foreign Office circular of 8 January 1851 was declared to be done in consequence of naturalised persons having "put forward claims to receive from Her Majesty's diplomatic and consular agents abroad the same degree of protection to which the natural-born subjects of H.M. are entitled." Had the general doctrine then attained the same degree of development as now, the remedy would probably have been confined to the refusal of protection in the original countries of the persons concerned, but that the executive's discretion was all that it was intended to deal with, and not the legal character of the naturalised person as a British subject, results as well from the motive recited as from the fact that, from 1854, such rights as might "be conferred by the grant of a passport to enable him to travel in foreign parts" were excepted from the refusal in the certificate[1]. When by the grant of a passport a person was acknowledged as a British subject, it could not be from a want of that character but as a measure of caution that he failed to get further protection. The place of these provisions is now taken by the Naturalisation Act 1870, s. 7, which begins (1)[2] by authorising the issue of a certificate of naturalisation to an alien who "within such limited time before making the application...as may be allowed by one of H.M.'s principal secretaries of state, either by general order or on any special occasion, has resided in the United Kingdom for a term of not less than five years, or has been in the service of the crown for a term of not less than five years, and intends when naturalised either to reside in the United Kingdom or to serve under the crown"; but the secretary of state may refuse the application without assigning any reasons. Then (2) it is provided that "an alien to whom a certificate of naturalisation is granted shall in the United Kingdom be entitled to all political and other rights, powers and privileges, and be

[1] See Cockburn, *Nationality*, pp. 115, 116. The very learned author does not take quite the view here adopted, or at least expresses it differently, not drawing a distinction between the legal character of a subject and his right to protection abroad.

[2] The numbers here given to the parts of the section are our own.

subject to all obligations, to which a natural-born British subject is entitled or subject in the United Kingdom"—words which remove the former political disabilities and put the naturalised person on a par with a natural-born subject, who, in whatever way the executive may behave to him, certainly has from British law no rights, powers, privileges or obligations out of the United Kingdom. Lastly (3) the section says: "with this qualification, that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalisation, be deemed to be a British subject, unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect." This, which it will be observed is not a destruction but a qualification of the character given by what precedes, limits the right of the naturalised person to protection abroad, whether by the British executive or by the British courts where they can give it on the ground of nationality, exactly as it is limited by the general understanding which we have seen growing up about the duties of states in the case of a conflict of nationalities. In our judgment therefore naturalisation under the act of 1870 is full, and British law does not deviate from the accepted view that nationality is single in principle, but the principle is tempered in practice by forbearance, extended willingly or stipulated by treaty, in the case of conflicting claims by states to the subjection of an individual.

The question whether we are right in that view becomes important when the person naturalised in the United Kingdom comes from a country which, as France[1], pronounces the expatriation of its subjects who cause themselves to be naturalised abroad. If we are right, the subject of such a state should lose his original nationality by naturalisation in the United Kingdom, and British authorities should be able to treat him as British even when he may have returned to his original country. But in 1888 Mr Justice Kay declined to appoint a guardian to an infant of the name of Bourgoise whose nationality depended on that of a father originally French, who had returned to France after naturalisation in England. He was informed by the affidavit of a French lawyer that a certificate under the

[1] Code Civil, art. 17.

Naturalisation Act 1870, qualified as it is by the clause we have numbered (3), would not be regarded in France as a full naturalisation, and would therefore not cause the loss of French nationality. His own opinion was in favour of that interpretation of the act, but on appeal, Lords Justices Cotton, Lindley and Bowen avoided giving an opinion on the point. It seems to us that the interpretation in question has merely been provoked by the fact that the section, as might be expected from an English draft, details the consequences of naturalisation in different circumstances, instead of contenting itself with granting naturalisation in broad terms and leaving the executive and the courts of law to deal as they can with the difficulties arising in their respective spheres[1].

Naturalisation effected in the British colonies or dependencies presents a question similar to that which has just been discussed

[1] See above, p. 222, note 1, the opinion of M. Cogordan, erroneous as we think, that a Danish statesman, expressing himself with similar caution, was radically opposed to the singleness of nationality in principle. There are articles on the *Bourgoise* case, which is reported both below and on appeal 41 Ch. D. 310, in the *Law Quarterly Review*, v. 4, p. 226 (Barclay); v. 5, p. 438 (Dicey); and v. 6, p. 379 (McIlwraith). Mr Barclay and Mr McIlwraith agree with the view taken by us of the effect of the Naturalisation Act 1870 on M. Bourgoise's nationality. Mr Dicey seems to lean to the opposite view, but his principal contention is that M. Bourgoise's nationality was immaterial to that of the children to whom the question of appointing a guardian arose; "in short, that the son of a naturalised British subject is, when born abroad, at birth an alien"—a point on which Lord Justice Bowen expressed a doubt in discussing the appeal. It has certainly been made clear by *De Geer* v. *Stone*, 22 Ch. D. 243, that the act of parliament which extends British nationality by the *jus sanguinis* to the second generation born abroad by male descent does not enable the last of those generations to transmit British nationality, which would be equivalent to giving an indefinite extension to the *jus sanguinis*. But the Naturalisation Act 1870 is not *in pari materia*. As the naturalised person does not come in through any statutory adoption of *jus sanguinis* or of any other rule, the question whether a rule has been adopted to a limited or an indefinite extent does not arise in his case. The object of naturalisation is to place an alien in the general position of a British subject, and his after-born children must consequently be in the general position of the children of British subjects, and able to transmit their nationality as such subjects generally can. Surely the interpretation even of the same words in different acts of parliament must be guided by the objects of the acts.

with regard to naturalisation effected in Great Britain or Ireland. By the Naturalisation Act 1870, s. 16, the legislature of any British possession may make laws "for imparting to any person the privileges or any of the privileges of naturalisation, to be enjoyed by such person within the limits of such possession." The French court of cassation, by a judgment of 14 February 1890, has held that laws made under this authority do not grant a complete naturalisation, and that therefore French nationality is not lost by accepting such naturalisation as they grant. But here again our opinion is that the British parliament cannot be held to have contemplated double nationality in principle, notwithstanding that overlapping effects may be produced by the conflict of states in conferring nationalities single in principle; that therefore complete British nationality is given by colonial naturalisation, the seemingly restrictive words in the act of 1870 being merely intended to prevent one possession from interfering with the internal law of another. The naturalised person, though no longer an alien, will continue to be subject to any disabilities, such as that to hold land, which the laws of another possession may have attached to him while he was an alien. It is in accordance with this view that the Foreign Office grants passports to persons having colonial naturalisation, and protects them everywhere except in their old country, and that the Merchant Shipping Act 1894, s. 1, allows persons naturalised in British possessions who have taken the oath of allegiance to become owners of British ships. Also, although persons naturalised under colonial laws are not expressly mentioned in any of the orders in council which regulate the exercise of British jurisdiction in foreign states, the Morocco order and that for the Persian Coast and Islands, both of 1889, apply without limitation to British subjects "by birth or naturalisation."

It may here be noticed that the king of England was always and is still able to make a person a subject without the aid of parliament, by letters of denization, but these have fallen into almost complete disuse. Their effect was to give the national character from the date of the letters, not from that of birth as naturalisation does, a difference which was important so long as aliens could not take or hold English land, its consequence

being that a denizen, the defect of what was called heritable blood not being cured in him, could not inherit land, nor could his issue born before his denization inherit it from him. And a denizen is still under certain incapacities by the st. 12 and 13 W. 3, c. 2, s. 3, passed from jealousy of the Dutch friends whom William introduced.

The doctrine of perpetual allegiance, expressed by the maxim *nemo potest exuere patriam*—no one can divest himself of his nationality by his own act—once generally prevailed. It is now as generally discarded, and a right of expatriation admitted. Many countries, as we have had occasion to notice in the case of France, disclaim their subjects who accept naturalisation abroad, while others permit expatriation without troubling themselves to enquire whether another nationality has been obtained, as Germany, which withdraws her own nationality from those who have been absent ten years from her territory without inscribing themselves at one of her consulates. Great Britain, by s. 6 of the Naturalisation Act 1870, makes the loss of its nationality the consequence of voluntarily becoming naturalised in a foreign state while in that state, but this, by s. 15, will not discharge from any liability in respect of any act done before such loss. And in most countries there are exceptions or reservations by which expatriation is either refused to those who have not performed their military obligations or is attended with penal consequences to them.

To the modes of legal expatriation must be added the practical expatriation which may arise from the action of the executive. Thus if a person, entitled by the respective laws of Great Britain and of some other country to the nationality of each, proves by his conduct that he chooses the latter as his state, and that state by its conduct accepts him as his subject, he may be treated by British authorities as an alien for the purposes of international law[1].

[1] *Drummond's Case,* 1834, on the award of the commissioners for liquidating the claims of British subjects in France; 2 Knapp 295. See the *Countess de Conway's Case,* on the same award, 2 Knapp 364, as to the circumstances in which protection may be given to one not strictly a British subject.

Nationality and Naturalisation in India.

We have referred to India as presenting an anomalous case in the classification of states, the territory in which Great Britain exercises power, or her empire in the looser sense of the word, being more extensive than that which is under her direct dominion[1]. It might be expected that this anomaly should be reproduced in the matter of nationality, and we find in fact that the subjects of "the several princes and states of India in alliance with His Majesty" stand in their relations to the British crown on different planes for different purposes. First, they do not enjoy the general rights of British subjects, and they are not included under the term "subjects" when used without express interpretation in a British act of parliament or in a law of British India. They can even be naturalised under the British Indian Naturalisation Act, no. 30 of 1852. Nevertheless, loyalty to the British sovereign is required from them as fully as from those to whom the name of subject is given. The Gaekwar of Baroda was tried for an attempt to poison the British representative at his court, under a proclamation of 13 January 1875 in which it was said: "whereas to instigate such an attempt would be a high crime against H.M. the Queen, and a breach of the condition of loyalty to the crown under which Mulhar Rao Gaekwar is recognised as ruler of the Baroda state." And that this doctrine is not applied only to the rulers appears from the case of the Manipurees who were tried and punished in 1891 for breach of the conditions of loyalty. One of them had indeed usurped the throne but had not been recognised on it by the Indian government, and that government officially enjoined "the subjects of the Manipur state to take warning by the punishments inflicted on the persons guilty of rebellion and murder." Nor is the government backward in furnishing the protection which, subject to the necessary discretion of the executive, is the correlative to the duties of subjects, and which is here all the more due in that Great Britain jealously excludes all foreign intervention on behalf of these persons. The st. 39 and 40 Vict., c. 46, declared the subjects of the native

[1] Above, p. 41.

Indian princes and states, when on the high seas or residing or being in any part of Asia or Africa which the sovereign might specify by order in council, to be entitled to the protection of the British government. And by the Foreign Jurisdiction Act 1890, s. 15, when the orders in council relating to the exercise of British jurisdiction abroad extend "to persons enjoying H.M.'s protection, that expression shall include all subjects of the several princes and states in India[1]." Further, in the treaty of 1873 with the sultan of Muskat it was agreed that in all treaties between him and Great Britain the words "British subjects" should include subjects of native Indian states, which can scarcely be regarded as any thing less than a representation to the sultan that those to be so qualified are really British subjects.

We have then to ask ourselves which of the two planes, on which stand the relations of the peoples of the native Indian states to the British crown, has the best claim to be identified with the nationality of international law; and we can scarcely doubt that the answer must be in favour of the lower and wider plane, on which stand all the relations external to the British empire in its looser sense which those peoples can have. Outside interference with the British empire in its looser sense being excluded, all those within the demarcation so established must for outside powers be its subjects and nationals, and the question whether internally they are allowed the name and rights of subjects belongs to the same category as the question whether the Filippinos are allowed the name and rights of citizens of the United States. The exclusion of international law from the relations between the king-emperor of India and the native states under his suzerainty, which we have seen to be the imperial principle[2], requires the frank adoption of international law up to the point at which the empire, including those states,

[1] The protection of persons not British subjects is contemplated by the Ottoman order of 1879, and by the Morocco, Persia, Persian Coast and Islands, and Siam orders, all of 1889. The Indians spoken of in the text would come in under these orders, though they also apply to foreigners to whom protection is extended under the practice the existence of which in the East is mentioned above, p. 199.

[2] Above, p. 42.

is marked off as one of its units. It follows that the naturalisation in so-called British India of an individual belonging to one of those native states is an act without any international significance. It merely raises him to a higher plane of rights within the empire, substituting a direct subjection to the king-emperor for an indirect one through a feudatory. But if a European or American, or any other true alien, should be naturalised under the Indian law, the same question would arise as to the effect of such an act which we have discussed with reference to the effect of naturalisation under British colonial laws, and would have to receive the same answer[1].

Native Races in Colonial Protectorates.

There is an obvious analogy between the position of the natives in a British colonial protectorate and that of the subjects of an Indian feudatory state, there being in each case the exclusion of outside interference combined with a more or less futile attempt to represent the area concerned as not being British territory. The two cases are practically dealt with in the same way. The Ottoman order in council of 1889 extends British protection to natives of any protectorate of His Majesty, and it is only for reasons of convenience that the Somaliland order 1899 and the Zanzibar order 1897 limit such protection to natives of British protectorates "beyond Africa and Arabia" in the former instance, and "beyond the dominions of the sultan of Zanzibar" in the latter.

Nationality of Wives and Minor Children.

The Naturalisation Act 1870, s. 10, provides that "a married woman shall be deemed to be a subject of the state of which her husband is for the time being a subject." This rule, though by no means of great antiquity, is now all but universally in force for the case of marriage between persons of different nationalities, perhaps the only exceptions being those of some American states in which the woman does not lose her original nationality by

[1] This is also Hall's view: *Foreign Jurisdiction of the British Crown*, § 21.

marrying a foreigner[1]. For the case of a man already married being naturalised without his wife being also expressly naturalised there is no such agreement, but two systems are met with, each of which deals with the minor children on the same principle as with the wife, though with varieties of detail in different countries. The most widely prevalent of these has for its object to secure the unity of the family. Thus by the law of Great Britain not only does the naturalisation there of a husband confer British nationality on his wife, but that of a father, or of a mother being a widow, confers it on every child of such father or mother who during infancy has become resident with the parent in any part of the United Kingdom ; and where a father, or a mother being a widow, loses British nationality, whether by the exercise of an option, by being naturalised abroad, or by marriage, the loss extends to every child of such father or mother who during infancy has become resident in his or her new country and is accepted by it as its subject[2]. And naturalisation in Germany extends, in the absence of contrary expression, to the wife and the minor children still under the *patria potestas*, and expatriation by ten years' residence abroad extends to the wife and the minor children under the *patria potestas*, if abroad with the husband or father[3].

The other system has for its principle that nationality cannot be changed without the express or implied consent of the party. Marriage with an alien is deemed to imply the wife's adoption of her husband's country, but since the naturalisation of the husband or parent involves no act of the wife or children from which their consent could be implied, they should in strictness neither acquire nor lose their nationality by reason of it. But in France, the only European country of the first

[1] Mr Bassett Moore, in a note in Dicey's *Conflict of Laws*, p. 204, quotes *Pequignot* v. *Detroit*, 16 Fed. Rep. 211, for, and *Comitis* v. *Parkerson*, 56 Fed. Rep. 556, against, a woman's loss of United States nationality by marrying an alien. Cogordan quotes Haiti (p. 262) as having enacted in 1860 that its nationality is not lost by marriage, and Venezuela and Brazil (pp. 233, 237, 444) as permitting an alien who has married a woman of the respective state to claim its citizenship.

[2] Naturalisation Act 1870, s. 10.

[3] Law of the North German Confederation of 1 June 1870, applied to the empire by the ordinance of 8 January 1873, secs. 11, 21.

magnitude in which this system exists, French nationality now accretes to the minor children of a father or surviving mother who is naturalised, subject to their option of declining it within a year from their majority[1]. In the United States the executive has acted in an analogous manner. A German naturalised there returned to Germany, thereby again becoming a German under the treaty of 1868, and taking with him a minor son born in the States after his naturalisation and therefore a natural-born citizen. The executive declined to interfere for his son's protection against the claim for the performance of military duty, made on him at the age of twenty, but the opinion given to it by the attorney-general was that, when of age, he would have the option of returning to the States and taking up the nationality of his birth which he had not lost[2].

[1] Art. 12 of the Code Civil, as modified by the law of 26 June 1889.

[2] 2 Wharton's *Digest*, § 184; Moore in Dicey's *Conflict of Laws*, p. 205. See above, p. 224, for the treaty.

CHAPTER XI.

NATIONAL JURISDICTION.

General considerations: Private International Law.

After considering a sovereign or independent state in relation to its territory and the ships which carry its flag, we have considered it broadly in relation to its subjects. But many problems which arise out of these two sets of relations await our consideration, and are delicate. What is the normal protection which a state is allowed to extend to its subjects in foreign countries? When a subject is abroad, may there not be a conflict between the authorities under which he stands in respect of his local situation and his personal allegiance? If the claim of either were strained to the full extent which the crude notion of sovereignty, territorial or personal, would bear, it would cover the whole ground and leave no field for the other. The local authority might apply a uniform law and jurisdiction to all persons within its territory, whether subjects or aliens, and to all things within its territory, whether belonging to subjects or to aliens: the personal authority might insist that its subjects should everywhere be independent of any law or jurisdiction but its own. Of course no state dreams of pursuing so extravagant a course in either direction, but are there any rules by which less extravagant conflicts may be avoided, or settled if they arise? And the question affects not only the freedom of action which a subject of one state may have in the territory of another, but also the legal appreciation of the consequences of such action as he may be free to take. It is not only whether what he desires to do is forbidden—which it may be

either as a crime or as being against public policy, for example, to marry within certain degrees of consanguinity—but also what will be the legal consequences of those acts of civil life which are not forbidden but of which the consequences differ in different systems of law. Nor is the conflict between local and personal authorities the only one conceivable. Since ships, which are within the physical limits of sovereignty, can penetrate the territorial waters of foreign states, what takes place on board them may lead to a conflict between two authorities both local in their nature.

So long as we know no more of international sovereignty than that it is equivalent to independence, it will be vain to try, often as the attempt has been made, to deduce the answers to these questions from sovereignty itself: it is precisely in reconciling the independence of different authorities, in the circumstances in which the territories, ships and persons subject to them may be placed, that the difficulties arise. If there were an accepted definition of international sovereignty which did not merely negative dependence but told us positively what a sovereign state might do, we should have what we want. But it would be idle to expect such an accepted definition in a system like that of international law, which is not the work of any legislator, but has arisen by the gradual clearing up of a confusion which specially affected the limits of authority. In Germany and Italy the resuscitated phantom of the Roman empire overshadowed all other authorities without extinguishing them. In France and under continental feudalism generally, a hierarchy of graduated authorities obscured the royal power. So far from sovereignty being the key to the solution of the questions indicated, it is only by putting together the solutions which they shall have severally received that it will become possible to form the complete picture or definition of international sovereignty.

In fact we have to travel outside the life of states for no small part of the materials from which this portion of international law has been framed. The life of individuals, in the relations of family and business which they form with one another, and in the relations which arise between them and constituted authorities whether in the ordinary course of

administration or from crime, expands beyond the boundaries of the states to which they belong, and forces the life of states to take cognisance of it. And for our purpose the life of individuals is the older of the two. Prehistorical research indeed makes it probable that the really oldest units of social existence were family or other groups, on the one hand effacing the natural individual and on the other standing apart from one another like little states, but that primeval condition left few traces in the developed form of Roman law. In that system, in which only one state was contemplated, individual life was brought under legal ideas and rules, administered by courts which had to do justice in all the circumstances to which human activity might extend, and which have not the less continued to exercise that function because international sovereignty has arisen as a later product by their side, and the incidents with which they have been called on to deal have occurred under different sovereignties. Thus international law has had to recognise the jurisdiction of courts which are not international, as at least under certain conditions an authority in matters concerning individuals, even although the circumstances of the contest may be such that if history had been different it might have had to be settled by the direct action of states.

The first of the conditions, which are indispensable in order that the sovereignty of a foreign state may surrender its right to interfere, is that the intelligence and integrity of the courts whose jurisdiction is to be trusted shall be above suspicion. This condition is fulfilled in the case of those states which possess European civilisation, indeed its fulfilment is presumed in reckoning a state as belonging to the full communion of international law: not to share European ideas would not be a more fatal bar to that communion than a want of probity in carrying out those ideas, and the expedient of consular jurisdiction in foreign territory would have to be resorted to[1].

Next, the territorial courts to which so much faith and authority is given must confine themselves within the generally accepted rules of jurisdiction, which, though not originally based on any principles of public international law, have been adopted

[1] See above, p. 40.

by that law through their continued acceptance since those principles have been developed. Thus art. 14 of the Code Napoleon enacts that a foreigner, even not residing in France, may be sued in the French courts for the execution of obligations contracted by him in foreign countries towards Frenchmen. This violates the generally accepted rule that in the absence of special circumstances a man cannot be called on to defend himself before a jurisdiction to which he is not personally subject: the plaintiff is the challenger and must seek his adversary. Consequently a French judgment given under art. 14 is not binding on the defendant's state: it is not within the conditions under which that state has entrusted the protection of its subjects to foreign courts of justice. And although such a judgment would not be considered to present a case important enough for direct intervention, its exorbitant character is marked by refusing to enforce it against the defendant or his property as foreign judgments are usually enforced.

The illustration just given may be taken as a type of private international law, or, as it is also called, international private law or the conflict of laws. This is that branch of law administered by national courts—and therefore a branch of national law, since such courts have no other authority than that of the national sovereign—which deals with cases including a foreign element, whether of persons—and whether these are foreign by residence or domicile or by nationality—of things, or of occurrences. It is as impossible as unnecessary to enter on it here at length, as well because it requires a volume to itself—and that a highly technical volume, as everything concerning the law administered by national courts must be—as because it is so separate from the rest of international law both in its methods and in its origin. One characteristic of it must however be pointed out. The decision of a case involving a foreign element as often turns on the question what national law shall be applied to it as on the question what is the proper national jurisdiction to entertain it, and from this fact comes the name "conflict of laws" which we have mentioned. For instance, shall an English court apply French or English law to the marriage of a French minor in England, or to a contract made in France between parties of undoubted personal competence? The protection

due to a foreigner may depend on the right answer being given to such a question of law as well as on its being given to a question of jurisdiction, but the former kind of question is usually more technical than the latter, and so much more difficult that there is much less agreement on it even among technical persons. It is therefore very natural that statesmen and diplomats should have little to say about it, and this leads us to an observation which holds not only in the conflict of laws but, since law is always highly technical, whenever a matter in which a state is interested, for itself or for its subjects, is before a court of justice. Let that court be one of which the jurisdictional competence is clear and the integrity undoubted, an international objection is then seldom made to the legal merits of its decision.

We have spoken of the authority which in matters concerning individuals international law recognises as belonging to courts which are not international. Does that authority extend to the civil rights of states, as those of property or contract? or is it coextensive with the class of right concerned, whether claimed by a private person or by a state? There is no reason in the nature of the case why the latter should not be the rule, and much reason why it should. A national court has better means of deciding the point raised than are possessed by diplomacy or even by an international arbitration: it is indicated as the proper authority to decide whether a civil right of property exists by the fact that, if it exists, it will have to be enjoyed under national protection: and a state may without indignity submit to a jurisdiction which it deems sufficiently enlightened and honest for its subjects to submit to. There is no general agreement on the question. In England the king may sue but cannot be sued in the ordinary course of justice: a claim against the crown is made by the extraordinary method of a petition of right. And a foreign state or sovereign cannot be made a defendant in an original suit on a personal claim[1], though it or he may sue, and will then be subject to all the proceedings in defence which could be taken against a private plaintiff. On the continent the opinions of jurists and the practice of the courts vary.

[1] See below, p. 241, note.

The most remarkable incident that has occurred of late years on the question is that between Greece and Rumania, of the succession to Vanghely Zappa, by birth a Greek of Ottoman nationality but who had obtained what is called the little naturalisation in Rumania. He bequeathed his immovable property to a public purpose in Greece, subject to a life interest which ended in 1891, whereupon the Greek government claimed to be put in possession of the inheritance in Rumania by the Greek consulate there. At the same time the nephews of the testator claimed the possession in the national court of first instance at Bukharest, on the ground that only Rumanians were allowed by a law of 1879 to acquire immovables in country districts, and then the Rumanian government intervened in the same court to claim the succession as vacant. The Greek government, by a note of $\frac{16}{28}$ May 1892, expressed "its surprise that the Rumanian state persisted in desiring to bring differences between states to the judgment of the national courts," and withdrew its representative from Bukharest, a step which led to a long interruption of diplomatic intercourse between the two states, each of which published opinions given in its favour by eminent international jurists. The faculty of law of the university of Berlin gave an opinion which is specially worthy of mention. It was that national courts are not competent as between states in matters of civil right arising out of international treaties, but are so in matters arising from pure private law, so far as regards the *forum rei sitæ*, the *forum hereditatis* and the *forum prorogatum*[1]. We differ from that opinion only in desiring that matters of civil right arising out of international treaties should not be excluded from the competence. The rights given by such treaties will in general be political, but

[1] 26 *Revue de D. I. et de L. C.* 438; and see other articles in the same volume at pp. 95 and 165, and t. 25, p. 178. The mention of the *forum rei sitæ* &c. shows why we have qualified our statement of the impossibility of suing a foreign state or sovereign in England (above, p. 240), by saying "on a personal claim." Notwithstanding the generality of the language in which that impossibility is laid down in the cases, it may be considered certain that some means would be found, in case of need, to prevent the title to property in England being withdrawn from the cognisance of the English court. We have dealt with the subject in Westlake's *Private International Law*, 3rd edn, pp. 225—232.

where they are civil the parties cannot be supposed to have intended that their enjoyment should be on a different footing from that of rights otherwise arising, except in cases which are sufficiently provided for by not giving against a state a *forum rei* or a *forum rei gestæ*. The cautious wording in that respect would protect a state from being sued in a court of law for a sum of money which it might have agreed by treaty to pay.

Criminal Jurisdiction: Extradition.

Crime is conduct forbidden under threat of punishment, as distinguished from conduct of which public disapproval is only shown by imposing legal disabilities on those who practise it, or by refusing to recognise it as the source of legal duties, as gambling, of which English law marks its disapproval by refusing to recognise a legal obligation as resulting from a gambling contract, though it is not criminal except in the special circumstances in which it is visited with punishment. The motive of punishment may be the maintenance either of external order or of a standard of personal conduct, and from these points of view criminal jurisdiction has relations with both territorial and personal sovereignty. The maintenance of external order is the peculiar province of a territorial power, consequently it has never been doubted that foreigners are subject to the criminal jurisdiction of the territorial courts for what they may do in the territory, or that the criminal law to be applied to them in respect of what they may so do is that of the territorial sovereign. A personal sovereign on the other hand may claim to maintain a standard of personal conduct among his subjects, regardless whether the external order which their acts may disturb is that of his or of any other country, and whether the country in which they may act looks on what they do as disturbing its public order at all; and for that purpose he may make his criminal legislation binding on his subjects in all parts of the world, provided that he does not attempt to enforce it in violation of another territorial sovereignty, but only against the persons or property of his subjects when found within his own dominions. The English common law stood at one extreme in these respects: it punished nothing

not done in England, thus adopting fully the principle known as the territoriality of crime. At the other extreme, as we have seen in speaking of the control over nationals abroad, there are states which divest their criminal law so far as regards their subjects of all territorial limit[1]. To carry the personal principle to that length is to adopt the view that criminal law is primarily an intervention on behalf of morality. The system introduced in the United Kingdom by acts of parliament is intermediate. That it does not wholly ignore the moral view is shown by the legislation against slavery and the slave trade embracing the acts of British subjects everywhere, but the larger part of the cases in which it avails itself of the personal element in sovereignty may be explained on narrower grounds. One of these is self-defence, as appears in the enactments applying to treason and misprision or concealment of treason committed abroad by British subjects, to which may be added that applying to bigamy, since the bigamy of a subject, even if committed abroad, must tend to disturb the family relations of his own country. Another is the view that the frequency of international intercourse has caused the public order of each country to become so general an interest that all countries ought to cooperate in maintaining it, and to this may be referred the statutory liability of a British subject for murder or manslaughter committed abroad.

The view last mentioned finds another expression in the extradition of criminals, which in practice is usually regulated by treaties and laws. The former are needed in order to secure fair treatment to the persons whose extradition is claimed or granted, and, it may be added, in order to secure a reciprocity between states which national pride commonly demands, although that condition is not called for either by justice to the persons surrendered or by the real interest of the state into the territory of which they have found their way. But this general adoption of the treaty method does not imply that a state would be held free to make its territory a shelter for fugitives from justice, and thereby a nuisance to its neighbours. It may be allowed much freedom in settling the terms of an extradition treaty, for instance, what crimes shall be considered as grave

[1] See above, p. 208, on the present paragraph generally.

enough to be included in it; but that it should consent to reasonable treaties, if its constitution prevents the surrender of accused persons in reasonable cases without them, must under the necessities of modern intercourse rank as an international duty, corresponding to which other states have a real though imperfect right[1]. Further, unless the executive of a state has very large powers under the constitution[2], laws will be necessary to enable it to enter into extradition treaties, perhaps under specified conditions, or to sanction them after they have been concluded, and to lay down the procedure necessary for carrying them into effect. The British laws now regulating the subject are the extradition acts 1870 and 1873, st. 33 and 34 Vict., c. 52, and st. 37 Vict. c. 60. To these and to the special books on them, such as the excellent one by Sir Edward Clarke, readers must be referred for the details as affecting this country. The more important of the points relating to extradition from a more general point of view can best be noticed in connection with the resolutions on the subject, commonly referred to as the Oxford resolutions, which were adopted by the Institute of International Law at its Oxford meeting in 1880, Arts. 13 and 14 however being remodelled at the Geneva meeting in 1892[3].

A demand for extradition does not necessarily come from the country in which the crime has been committed. It may also be made by the state of which the accused is a subject, if the crime is one of those for which that state punishes its subjects when guilty of them abroad. In the one case the jurisdiction asserted by the demanding state is the *forum delicti commissi*, in the other the *forum rei*, which in criminal matters is the *forum*

[1] As to imperfect rights, see above, p. 153.

[2] In 1864 the executive of the United States surrendered Arguelles to Spain in the absence of a treaty and by its own authority; 2 Wharton's *Digest*, § 268; Wharton's *Conflict of Laws*, § 835, note. And in 1876 Spain surrendered Tweed to the United States in the absence of treaty, a paragraph in *Mémorial Diplomatique* explaining that the extradition had been made to the municipality of New York and not to the government of Washington, which always refused it (the precedent in Arguelles's case had not been followed): Lawrence, *Commentaire sur Wheaton*, t. 4, p. 400. An extradition treaty between the United States and Spain was concluded in 1877.

[3] Oxford, 5 *Annuaire* 127; Geneva, 12 *Annuaire* 182; the whole, *Tableau Général*, p. 104.

originis[1], or of nationality, not that of domicile; and so it may happen that the extradition of the same person is demanded by two states. In that case art. 9 of Oxford declares that the preference ought to be given to the state on the territory of which the crime has been committed, a decision justified by the probability that the witnesses will be there and cannot be carried to another country without delay and expense, and by the comparative ease with which any supplementary information that may be desired can be procured there. To take down the testimony and transmit it would be regarded as a poor substitute in countries attached to oral examination before the judge, and jury if any. Art. 6 of Oxford lays it down in more general terms as desirable that the *forum delicti commissi* should as far as possible be employed, a proposition which invites a state to surrender its own subjects for trial in the country of the crime, and this has been done by Great Britain[2]. But it is rarely or never done by other states, the practice of asserting criminal jurisdiction in respect of what is done by subjects abroad, at least in the graver cases which the treaties make the subject of extradition, having been so widely extended that the power to try is rarely lacking in the domestic law, and there being a strong feeling on the continent that, where that power is given by the domestic law, it is the right of the criminal to be tried by what are called his natural judges. Art. 7 of Oxford, taking note of this actual practice which exempts nationals from extradition, points out that at least a nationality acquired after the commission of the fact for which extradition is demanded ought not to be respected[3]. Art. 8 declares that the juris-

[1] See above, p. 215, as to the forum resulting from *origo*. On the continent the judges of the *forum originis* are described as the natural judges of an accused person.

[2] Burley, though a British subject, was surrendered by Canada to the United States: 1 *Upper Canada Law Journal*, N.S., 20. And De Tourville, a Frenchman naturalised in England, was surrendered by England to Austria in 1876, notwithstanding that by the Anglo-Austrian treaty of 1873, s. 3, it was provided that the contracting parties should not be obliged to concede the extradition of their own subjects: *Annual Register*, 1876, p. 111.

[3] Vattel does not mention extradition to the natural judge; he not only says that grave offenders are generally surrendered on the requisition of the

dictional competence claimed by the demanding state must not be in contradiction with the law of the country of refuge, but the discussion on it shows that contradiction was not intended to be inferred from silence, so that domestic legislation neither giving nor expressly condemning the *forum rei* should not be a bar to granting an extradition demanded on the ground of that forum[1]. Art. 10 completes the subject of jurisdiction in extradition by suggesting that if the same person is demanded by different states in respect of different offences, the preference should in general be given on the ground of the relative gravity of the offences, and, in case of doubt on that point, on the ground of the priority of the demand.

Arts. 11 and 12 of Oxford lay down that extradition ought only to be granted for acts which are also criminal by the law of the state on which the demand is made, and which are of some gravity, and arts. 13, 14 and 15, the two former as modified at Geneva, deal as follows with a very difficult question.

13. Extradition is inadmissible for purely political crimes or offences:

Nor can it be admitted for unlawful acts of a mixed character or connected with political crimes or offences, also called relative political offences, unless in the case of crimes of great gravity from the point of view of morality and of the common law[2], such as murder, manslaughter,

sovereign in whose lands the crime has been committed, but mentions with approval the Swiss practice by which the proper magistrate of the accused hands him over to the magistrate of the place where the crime was committed, on letters rogatory from the latter: l. 2, § 76. The first instance of a refusal to surrender nationals of the country on which the demand is made is said to have been that of the Austrian Netherlands, in carrying out an extradition arrangement of 1736 with France, although no such exception was made in the arrangement; France then similarly refused on the ground of reciprocity: 2 Calvo, § 1227. It may be observed that though the word "extradition" is modern, the thing is at least as old as the twelfth century, the treaty of 1174 between England and Scotland having provided for the reciprocal surrender of persons accused of having committed felony in the other country, unless they preferred to stand trial where they were: 1 Rymer's *Fœdera* 39. The old terms in French were *restitution, remise, livraison*; and the first official occurrence of *extradition* is said to be in a French edict of 1791: 2 Calvo, § 1226.

[1] 5 *Annuaire* 113.

[2] Common opposed to political. The words translated as murder and manslaughter are *assassinat* and *meurtre*.

poisoning, mutilation, grave wounds inflicted wilfully with premeditation, attempts at crimes of that kind, outrages to property by arson, explosion or flooding, and grave robbery, especially when committed with arms and violence.

So far as concerns acts committed in the course of an insurrection or of a civil war by one of the parties engaged in the struggle and in the interest of its cause, they cannot give occasion to extradition unless they are acts of odious barbarism or vandalism forbidden by the laws of war, and then only when the civil war is at an end.

14. Criminal acts directed against the bases of all social organisation, and not only against a certain state or a certain form of government, are not considered political offences in the application of the preceding rules.

15. In any case, extradition for crimes having the characters both of political and common law crime ought not to be granted unless the demanding state gives the assurance that the person surrendered shall not be tried by extraordinary courts.

Since the fall of that diplomatic system known as the Holy Alliance, it has been agreed that the society of states does not number among its objects the propagation or maintenance of given principles of government in them respectively, nor even the prevention of revolutionary changes in their government; it follows that extradition for political offences cannot be claimed by any international right, and cannot be conceded without shocking the sentiment of free countries. The question then arises how common are to be distinguished from political offences, so that, while the latter are duly protected, the former may not enjoy under cover of politics an exemption from extradition to which they have no just claim. It is clear that motive must have much to do with the distinction, but not everything, as well because motives are often mixed as because an admissible motive may be pursued by inadmissible means. As an example of the necessity of considering motive we may take what must often happen at the commencement of an insurrection. When an insurrection is on foot it is easy to admit, with art. 13, that the line for the refusal or grant of extradition should lie between acts which are or are not allowed by the laws of war. But it may be impossible to start such a struggle otherwise than by acts, such as an attack on a sentry, which, if viewed in relation to the state of peace out of which they suddenly spring, would be undistinguishable from common crimes except by the political motive. We may say of such

acts, similarly to what we have observed about the pretension to treat insurgents as pirates, that it would be absurd to subject to extradition acts necessary for setting up a state of things in which they would not be subject to extradition[1]. As examples of the necessity of not making motive a conclusive test we may take the case of anarchists provided for in art. 14 and that of regicide. In 1856 the Belgian court of cassation, in accordance with what we venture to think must be the general opinion, opined for granting, but the *chambre des mises en accusation* of Brussels opined for refusing, the extradition of a person charged with an attempt to murder the emperor of the French by blowing up a railway train. The motive here was political and unmixed, but the Belgian extradition law was amended by enacting that attempts on the life of the head of a foreign government or of a member of his family should not be considered to be or to be connected with political offences. And a clause to that effect has since been inserted in a large number of extradition treaties, though Switzerland and Italy have refused such a clause to France, the former however reserving to the federal authority the duty of examining in any particular case whether the act in question was political or not. In Italy it was thought that a different classification of crimes from that made by the national law could not be permitted in a treaty, but this seems a strained objection, considering the different purposes of classification on such occasions[2].

Perhaps for the purpose of laying down rules more cannot be said on the distinction between political and common offences for the purpose of extradition than is said in the above art. 13, but judges and statesmen will often be aided by the consideration of motive in administering any rules on the subject[3].

[1] See above, p. 181. It has been suggested that for the purpose of extradition acts done in commencing an insurrection should be judged as they would be judged if the insurrection had been on foot when they were done. But it would often be impossible to find among acts of war any presenting in their circumstances a sufficient resemblance to those in which the act to be judged was done.

[2] 2 Calvo, §§ 1264—1268.

[3] In *Castioni's Case*, [1891] 1 Q. B. 149, Justices Denman, Hawkins and Stephen acted on the interpretation of the extradition acts proposed by

The most important of the remaining Oxford resolutions express the views generally held, and are as follows.

16. Extradition ought not to be applied to the desertion of military persons belonging either to the land or to the sea forces, nor to purely military offences.

The adoption of this rule does not prevent handing over sailors belonging either to the service of the state or to the merchant service.

The desertion of sailors in ports it is thought would be too frequent but for the reserve thus made. England had conventions for the surrender of sailors in merchantships, under the Foreign Deserters Act 1852, which contained an express exception of slaves, but that act was repealed by the Merchant Shipping Act 1894. In the eighteenth century England had such conventions for soldiers.

17. A law or treaty of extradition may be applied to facts committed before it came into force.

This is the rule for all laws of procedure, which extradition essentially is. Only substantive laws have no retroactive force.

19. It is desirable that the judicial authority in the country of refuge should be invoked, to appreciate the demand for extradition after hearing both sides.

21. The examination should have for its object the general conditions of the extradition and the probability (*vraisemblance*) of the accusation.

The extradition court in the country of refuge is in the position of a magistrate committing a prisoner for trial, and

the last mentioned in his *History of the Criminal Law of England*, v. 2, p. 71, namely that "fugitive criminals are not to be surrendered for extradition crimes if those crimes were incidental to and formed a part of political disturbances." At the same time they made it clear that this does not include all crimes committed *in the course* of an insurrection, while on the other hand crimes committed *in furtherance* of an insurrection must not be closely scrutinised as to their being necessary for the purpose. Meunier was surrendered by Great Britain to France in 1894, Justice Cave saying: "it appears to me that in order to constitute an offence of a political character there must be two or more parties in the state, each seeking to impose the government of their own choice on the other, and that if the offence is committed by one side or the other in pursuance of that object it is a political offence, otherwise not. In the present case.....the party with whom the accused is identified by the evidence and by his own voluntary statement, namely the party of anarchy, is the enemy of all governments." Justice Collins concurred. Clarke's *Law of Extradition*, 4th edn, p. 187.

must limit itself to seeing that there is reasonable ground for the commitment, as if the trial were to take place at home instead of abroad. But special rules may be required in order to enable the court to receive for that purpose evidence sent from abroad, as the depositions of witnesses taken in foreign form or the reports of foreign magistrates charged with preparing the accusation. For this, if necessary, the extradition law must provide.

22. The government which has obtained an extradition for a given fact is bound, in the absence of a treaty to the contrary, not to allow the surrendered person to be tried or punished except for that fact.

This understanding is necessary in order to prevent the extradition of political suspects being obtained for common offences and availed of to bring them to trial or punishment for political offences. Of course it does not apply to acts done after the extradition, nor even to prior acts if the person, after being liberated, freely remains in the country to which he has been surrendered. Under the British extradition acts a prisoner cannot now be surrendered unless a condition to the effect of art. 22 is recognised by the demanding country, but the cases referred to in the correspondence between Great Britain and the United States arising out of Winslow's case, which occurred in 1876, prove that such a condition was not deemed necessary in the older practice of either country[1]. The rule was embodied in the convention of 1890 between the two countries.

23. The government which has granted an extradition can afterwards consent to the trial of the surrendered person for facts other than those for which he was surrendered, if they are such as might support extradition.

[1] See 2 Wharton's *Digest*, § 270. In Winslow's case the British government had maintained, and the United States had denied, that the rule of art. 22 applied as part of international law to extraditions under a treaty not expressly incorporating it. It is remarkable that afterwards, but before the convention of 1890, the supreme court of the United States decided in U. S. v. *Rauscher*, 119 U. S. 407, that a man surrendered under the old treaty on a charge of murder could not be tried for a minor but not extraditable offence constituted by the same facts. Art. 22 would appear to allow trial and punishment for any offence constituted by the facts alleged as the ground for extradition, whether or not technically described as in the extradition proceedings, provided that the offence would have been extraditable under the description used. This is also Dr Wharton's view of the international law: 2 *Digest*, p. 798.

24. The government which has a person in its power through an extradition cannot deliver him to another government without the consent of that which surrendered him to it.

The last provision is a further and necessary safeguard for political suspects.

Criminal Jurisdiction over aliens in respect of Facts not committed in the Territory.

As one of the conditions subject to which international law accepts national jurisdiction as an authority in matters concerning individuals, we have mentioned the rule that in the absence of special circumstances a man cannot be called on to defend himself before a jurisdiction to which he is not personally subject[1]. The illustration we then gave was drawn from the law of obligations, but it is at least equally objectionable that a man should be prosecuted criminally in a country not his own for a fact not committed in that country, such prosecution wanting both a territorial base in the locality of the crime and a personal base in the nationality of the accused, and involving the pretension of the state of the prosecution to regulate by penalties the behaviour of persons not its subjects in territory not its own. That pretension however has been made, and brings into conflict two applications of territorial sovereignty, one supporting it by reference to the place where the penalties threatened are enforced, the other rejecting it by reference to the place where it claims to regulate the behaviour of the population; and the difference of opinion about it furnishes a striking example of the impossibility of solving, from the sole contemplation of international sovereignty without a more exact definition than it has yet received, all the delicate questions arising on the scope of national jurisdiction[2]. Historically, the criminal prosecution of aliens for facts committed abroad is perhaps not traceable earlier than towards the close of the eighteenth century[3], but since that time it has been enacted in

[1] Above, p. 239.

[2] See above, p. 237.

[3] The only earlier authority in favour of it quoted by Fælix (*Droit International Privé*, l. 2, t. 9, c. 3) is that of Paul Voet, *De Statutis eorumque concursu*, sect. 11, c. 1, nos. 1 and 5.

France, Germany, Austria, Italy, Spain, Belgium and Switzerland, for offences the enumerations of which are not quite uniform but which may be described generally as being against the safety of the punishing state or its currency, so that the principle of self-defence may be invoked in support. This legislation has the sanction of the Institute of International Law, except that to the condition that "the facts constitute an attack on the social existence of the state in question and compromise its security," the Institute adds the condition that "they are not provided against by the penal law of the country in the territory of which they have taken place[1]." Russia, Greece and Mexico go further, punishing all offences committed by aliens abroad against their subjects, and the Netherlands do the same for the graver of such offences.

The international validity of the Mexican law was contested by the United States in the case of Cutting, one of their citizens who was arrested and convicted under it in 1886 for a libel on a Mexican published in the States. The matter ended by the release of the prisoner on the plaintiff (for it was not a public prosecution) withdrawing his action in order to appease the trouble, but the Department of State of the Union issued a report on the case by the assistant-secretary Mr J. Basset Moore, in which all prosecution of aliens for facts committed abroad was condemned[2]. And neither the Union nor England has given to its criminal law any operation of that description. Indeed such an extension of criminal law seems to be quite unnecessary for the maintenance of common social order. Ordinary crimes will be punished where they are committed or in the offender's country, or extradition of the offender will be granted. It is especially as a defence against attacks made on a government, whether in the press or by more active means, and which in the country where they are made are not repressed to the liking of that government, that the extension is desired. But these are the very offences for which extradition is refused, so generally is it felt that they are not matters on which

[1] In 1879, 3 *Annuaire* 281, and in 1883, 7 *Annuaire* 157.

[2] Mr Moore's report is summarised and supported by M. Albéric Rolin in an article in 20 *R. de D. I. et de L. C.* 559. The earlier proceedings in Cutting's case may be seen in 2 Wharton's *Digest*, §§ 15 and 189.

governments ought to make common cause with one another, or to facilitate prosecution in a state of which the government is an interested party. The same principle ought to prohibit any relaxation, for such objectionable purposes, of the common rules limiting national jurisdiction. Conspiracy against the government of a friendly state ought to be punishable in the *forum delicti commissi*, and usually is so. Against slighter attacks to be less sensitive is a better remedy than one which would place really harmless public writers in danger, when travelling, of punishment for some language of theirs, forgotten by them, which might be qualified by a foreign power as *lèse majesté*. We are glad that these views had the concurrence of so judicious an authority as Hall[1], and we must express the opinion that a single century of a practice which, however widely extended, does not include two such countries as Great Britain and the United States, cannot be considered to have given international validity to a very enlarged view of national jurisdiction.

An example which rests on the same principle is furnished by national legislation declaring some fact committed at sea to be piracy which is not within the international definition of that crime, as has been done by Great Britain and the United States for the case of the slave trade, and by France for that of an armed vessel navigating in time of peace with irregular papers. Such laws cannot arm the courts with the international title by which "piracy under the law of nations may be tried and punished in the courts of justice of any nation, by whomsoever and wheresoever committed": they "can only be applied by the state which has enacted them, and then with reference to its own subjects and in places within its own jurisdiction[2]." And this would be true even if the accused persons, as might sometimes happen, had voluntarily entered the territory of the state which presumed to try them, thus supplying the element necessary for an exact parallel with such a case as Cutting's. It cannot be considered that by entering a given territory an individual waives the international rules of jurisdiction which exist for his security in it.

[1] § 62.

[2] Wheaton, *Elements*, part 2, ch. 2, § 124 (Dana's numbering).

Jurisdiction in the case of Foreign Ships in Littoral Seas and Harbours.

We next come to the conflict between a right of jurisdiction resting on the basis of geographical territory, and one in which the personal element of jurisdiction is reinforced by an element so far of a territorial nature that the ship on which the right is claimed is described by a metaphor, not unreasonable if metaphor is to be admitted, as floating territory. What is true is that the ship is a scene on which the use of force is normally allowed only to the state to which she belongs, and, this being so, it cannot be overlooked that the same is true of the quarters of an army, and that therefore the case of an army permitted to march through foreign territory in time of peace presents much analogy to that of a ship in a foreign harbour. In each case the physical extent of the normal operation of a foreign force penetrates a geographical territory, and in each that circumstance is only brought about by the express or tacit permission of the geographical sovereign. Consequently, in both, the international rules of jurisdiction to be applied are often treated, especially by British and American writers, as dependent on the terms on which the geographical sovereign may be presumed to have given his consent to the presence of the foreign element. But since usage and reason furnish the only arguments which can be employed in ascertaining the terms to be presumed, that mode of treating the question is merely a veiled method of referring it to usage and reason. And it cannot even in theory be applied to the case of foreign ships passing through littoral seas, which presents the same circumstance of the interpenetration of territorial and quasi-territorial rights, since the ships are there by virtue of no permission, even tacit, but by virtue of the right of innocent passage, which has always been deemed to be reserved when the right of a land sovereign over any part of the sea has been described as one of sovereignty[1].

[1] Except in such ancient isolated and extravagant cases as are mentioned above, p. 161. If we believed in an original partition of the world, winding up a previous state of nature (which even to the school of the *jus naturæ et gentium* was probably more a way of putting an

Standing then on the ground of usage and reason, the case which may occur on land is one on which no doubt has been felt, and it may be disposed of in the words of Wheaton. "The grant of a free passage [to an army] implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require[1]."

Next, two distinctions must be made with regard to ships. One is that between public and private ships, not, it will be observed, between ships of war and merchantmen, fishing boats, yachts or other vessels of a peaceful description. The rights of a public ship in territorial waters are those of the state to which she belongs, the honour and interest of which are directly engaged in her, and are therefore no weaker when she is built, equipped or employed for trade or any other peaceful purpose than when she forms a part of the military marine[2]. The other

argument than an historical belief), we should say that nations did not agree to allow sovereignty (the old writers would oftener have said property) in the sea except subject to a right of innocent passage. Now we say that the two institutions have grown up together, sovereignty over the sea never having had a prior existence to the right of innocent passage, so that the latter cannot be considered to have been carved by concession out of the former.

[1] *Elements*; Atlay's edition, p. 155, § 99 in Dana's numbering. Chief Justice Marshall expressed himself to the same effect in the case of *the Exchange*, 7 Cranch 140.

[2] *The Parlement Belge*, L. R., 5 P. D. 197; Lords Justices James, Baggallay and Brett. Their lordships speak of the ship in question as "the property of a friendly sovereign in his public capacity, and used for purposes *treated by him* [the italics are ours] as public national services"; but they also say that to bring her under the local jurisdiction "it must be maintained either that the ship has been so used as to have been employed substantially as a mere trading ship and not substantially for national purposes, or that a use of her in part for trading purposes takes away the immunity, although she is in possession of the sovereign authority by the hands of commissioned officers and is substantially in use for national purposes." This proposition however was not really intended to narrow the doctrine involved in the first extract, for the court proceeds to get rid of the question of substantial employment by mentioning that "the ship has been by the sovereign of Belgium, by the usual means, declared to be in his possession as sovereign and to be a public vessel of the state"—a declaration on the part of the foreign sovereign which would always result

distinction turns on whether a ship is a passing one: it is that between her using the right of innocent passage and her being either in a foreign harbour or stationary or hovering in foreign littoral waters, not that between the waters in which she is. She gains nothing by the possibility that she might have availed herself of a right of innocent passage which is actually dormant, and her legal position while stationary or hovering in littoral waters will be the same as if she were in a harbour, in which that right does not exist.

Distributing our subject with reference to these distinctions, a public passing ship is entirely free from the jurisdiction of the geographical sovereign, whether in matters concerning the ship or in those concerning what takes place on board her. A public ship in a foreign harbour, or in a littoral sea but not passing, is free from the jurisdiction of the geographical sovereign in all matters concerning the ship herself, such as the title by which her state has acquired her[1], the damage which she may have done by a collision[2], the salvage which may be due for services rendered to her[3], or the possibility of seizing her in satisfaction of a debt due from her state[4]. The local jurisdiction is equally excluded in the case of disturbances on board her, those having to be dealt with by her commandant alone; but that rule does not apply "if the crew, though remaining on board, commits against other ships in the anchorage, or against the inhabitants of the port, acts of a nature to disturb public order. The local

by implication from his declining to submit to the jurisdiction—and by repudiating the notion "that any court can enquire by contentious testimony whether that declaration is or is not correct." The statement in our text is therefore supported in all its breadth by the effect of the case.

[1] *The Exchange* v. *McFaddon,* 7 Cranch 116.

[2] *The Parlement Belge,* L. R., 5 P. D. 197.

[3] *The Prins Frederik,* 2 Dodson 451; *The Constitution,* L. R., 4 P. D. 39. The cargo of the *Constitution* was held to be equally free from the local jurisdiction on the claim for salvage. The judge, Sir R. Phillimore, said "it is on board a foreign vessel of war, and is under the charge of a foreign government for public purposes"; 48 L. J., N. S., P. D. and A. 15.

[4] Bynkershoek mentions the seizure of Spanish ships of war at Flushing for a debt due from the king of Spain. The states general interposed, and the ships seem to have been released: Marshall, C. J., 7 Cranch 145.

authority has in that case a full right to take the measures necessary in the interest of general security, and may even require the foreign ship of war to quit the port. When the crew is on shore and there commits offences, they are triable by the ordinary courts; only the facts ought to be brought at once to the knowledge of the commandant of the ship, and an arrangement should be made with him for the prosecution and punishment of the offenders either by the local courts or by the military authorities of the ship. In logic, the exclusive competence of the courts of the port ought to be admitted; but the wish to keep on good terms with foreign powers has caused this extension of the maritime jurisdiction of the foreign state to be currently adopted in practice[1]."

With regard to persons betaking themselves for protection to a foreign public ship in territorial waters and not merely passing, the general rule must be distinguished from the conduct to be observed in the case of political refugees or in that of slaves. The local interest that asylum shall not be granted to common criminals is not encountered by any contrary interest of the ship or her state, but the political and social feelings of the latter deserve at least some degree of respect under the immediate shadow of her public flag, as they do when the action of a government is concerned in dealing with demands for extradition. Taking first the general rule, the United States attorney-general Bradford gave in 1794 the opinion that "a writ of *habeas corpus* may be awarded to bring up an American subject unlawfully detained on board a foreign ship of war[2]." And Lord Stowell, then Sir W. Scott, in answer to a question put to him by the admiralty "whether any British subject, coming on board any of H.M.'s ships of war in a foreign port, escaping from civil or criminal process in such port and from the jurisdiction of the state within whose territory such port may be situated, is entitled to the protection of the British flag"—said "I know of no such right of protection belonging to the British flag.....I am led to think that the Spaniards would not have been chargeable with illegal violence if they had thought proper to employ force in taking this person out of the British

[1] Bluntschli, *Droit International Codifié*, § 321.

[2] 1 Wharton's *Digest*, § 36.

vessel," which was H.M.S. Tyne lying in the port of Callao[1]. And Lord Palmerston was "of the opinion that it would not be right to receive and harbour on board a British ship of war any person flying from justice on a criminal charge, or who was escaping from the sentence of a court of law[2]." There is therefore a consensus of high authorities in favour of the proposition that the local jurisdiction as to crime committed outside a foreign public ship is not ousted by an escape to her deck, and an opinion given by the United States attorney-general Cushing during the Crimean war, which is sometimes quoted against it, only affirmed the very different point that a prisoner of war brought into a United States port on board a foreign ship of war or her prize could not be taken out of her by *habeas corpus*[3]. Such a prisoner would clearly be under the military jurisdiction of the foreign state, which we have seen to be respected both in the case of disturbances on board a public ship and in that of an army allowed to cross a territory on land.

The exceptional protection extended to political refugees by a public ship in a foreign harbour was not only rather vaguely acknowledged as we have seen by Lord Stowell, but was broadly asserted by Lord Palmerston in the same communication from which we have quoted his opinion on the case of common criminals. In that communication he gives the following practical instructions about it. "Although the commander of a ship of war should not seek out or invite political refugees, yet he ought not to turn away or give up any who may reach his ship and have obtained admittance on board. Such officer

[1] *Report of Royal Commission on Fugitive Slaves,* pp. lxxvi, 226. The person in question was John Brown, a political refugee, who was brought by the Tyne to England and there dismissed without restraint. Lord Stowell reserved the possibility that cases might arise in which such protection as was given by the Tyne "might be indulged, but," he added, "such cases are justified only by their own peculiar and extraordinary circumstances, which extend no further than to those immediate cases themselves, and furnish no rule of general practice in such as are ordinary. How far the case of Mr Brown comes within such a description I am not enabled to state confidently by any exact knowledge of the facts."

[2] Communication from the Foreign Office to the Admiralty, 4 Aug. 1849; *ib.*, p. 155.

[3] 1 Wharton's *Digest*, § 36.

must of course take care that such refugees shall not carry on from on board his ship any political correspondence with their partisans on shore, and he ought to avail himself of the earliest opportunity to send them to some place of safety elsewhere." This correctly expresses the conduct which the navies of states internally free follow in their visits to foreign ports.

The case of refugee slaves is not parallel to that of political refugees, for it concerns the permanent institutions of the country visited by the ship, and these might be seriously disturbed if the rule of not turning away or giving up any who may have succeeded in getting on board were extended to slaves. Yet here also some respect is demanded by the feelings of nations which reject slavery, and it has been found difficult to arrange a *modus vivendi* between such nations and the slave-holding peoples which their public ships may visit. No settled rules had in fact been arrived at before the importance of the question as one of general international law had been destroyed by the universal abandonment of slavery among the peoples of European civilisation who alone are admitted to the full communion of that law. As between Great Britain and the slave-holding peoples of other civilisations which are visited by the British navy, among which rank conspicuously those of Arabia and Persia whose coasts are resorted to for trade or for the pearl fishery by Indians requiring British protection, the subject is therefore left open to be regulated on the particular considerations arising. And readers who desire information on it may be referred to the Report of the Royal Commission on Fugitive Slaves, 1876.

In the case of a private ship the foreign jurisdiction which has penetrated the geographical sphere of the local one, not being exercised by a naval officer but by a private captain or by a consul acting in pursuance of a treaty between the foreign and the local state, does not place the dignity of the foreign state so directly at issue, and is less capable of satisfying emergencies. A larger range therefore is allowed to the local jurisdiction. Matters concerning the ship herself, as the proprietary title to her, damage done by her, salvage due from her, or her seizure in satisfaction of a debt, will belong to the local courts whenever referred to them by the accepted rules of national jurisdiction

applied to her actual situation or to the persons of her owners or others interested in her. If her crew, whether on shore or while remaining on board, commit offences against other ships in the anchorage or against the inhabitants of the land, the local courts will punish them, and the local authorities will not be under the necessity of requiring her to quit their waters but will use on board of her whatever force may be needed. Even offences committed on board her against persons and things also on board her will fall under the local jurisdiction if, in the words of the Institute of International Law which we have quoted, they "involve a violation of the rights or interest of the littoral state or of its subjects not forming part of its crew or passengers[1]." And all this will be equally true of private ships exercising the right of innocent passage, although in their case the occasions for applying it will be rare. The Territorial Waters Jurisdiction Act 1878 recognises the doctrine by declaring in general terms that "offences committed on the open sea within the territorial waters of H.M.'s dominions" are within British jurisdiction (sect. 2), while requiring (sect. 3) the consent of a secretary of state or of the governor of a British dominion for the institution of proceedings. Thus, before there can be a practical assertion of jurisdiction over persons on board passing ships, an opportunity is given to the executive authority of the state for considering the principles by which such an assertion ought to be limited, while the difficulty is avoided of giving to those principles so exact a definition as English courts of law are accustomed to require of the rules which they administer.

If such an exact definition were attempted the question would arise whether the interests of the littoral state in the language of the Institute, or its peace and tranquillity as is often said in expressing the same idea, are to be understood only in a material sense, or whether the moral perturbation which a crime committed on board a ship would cause on shore is sufficient to call the local jurisdiction into lawful activity. The latter view has been generally adopted for cases of grave crime, even although those who are physically injured belong to the ship, and this not only from the probability that the mental

[1] Art. 6, above, p. 189. The reservation made for public ships in art. 8, p. 190, reduces the scope of art. 6 to private ships.

excitement of the population may lead to material disturbance, but because it concerns the duty and dignity of a country to see that grave crime committed within its geographical limits does not go unpunished[1]. If the offence were committed on board against a person belonging to the shore, the injury to the littoral state would be too unmistakable for the local right of interference to be questioned, whatever the gravity of the fact; and we agree with Ortolan that the same would be true in the case of an offence committed on board against any one by a stranger to the ship. In case of doubt to which of the jurisdictions a case most appropriately belongs, the local government (either by its

[1] In the cases of *The Sally* and *The Newton*, 1806, private vessels of the United States in French ports, jurisdiction in respect of offences of no great importance, committed on board them by and upon persons belonging to them, was claimed by the United States consuls and by the local judicial authorities. The council of state decided against the latter on the ground that their assistance had not been asked for and that the tranquillity of the ports had not been compromised. In the case of the Swedish vessel *Forsattning* in the Loire, 1837, the council of state directed the surrender to her commandant of one of the crew who was accused of poisoning some of his fellow seamen. But it seems that this was felt to have been wrong, and in 1859 the court of cassation maintained the conviction of Jally, the mate of the United States merchantman *Tempest*, for the murder of one of his sailors committed on board. All these cases are given in Ortolan, *Diplomatie de la mer*, l. 2, c. 13, and Annexe J. But the supreme court of Mexico held, 1876, that that state had no jurisdiction in the case of the murder of one Frenchman by another on board the French merchantman *Anémone*, the tranquillity of the inhabitants of the port not having been disturbed, and the people of the ship having simply brought the body on shore without making an accusation or asking protection: 3 *Journal Clunet* (*J. d. D. I. P. et de la L. C.*), p. 413. This however is a rare exception. In conformity with the case of *The Tempest* and the opinion of Ortolan the supreme court of the United States, 1886, refused to deliver to his consul on *habeas corpus* a Belgian who had killed a fellow seaman on board a Belgian steamer moored to a dock in New Jersey: *Wildenhus's Case*, 120 U.S. 1. It may be observed that when the local jurisdiction deems the case to be not one for itself, the jurisdiction of the ship's commandant or of the consul of the ship's nation may extend over persons not members of that nation who, by enlistment in its crew, have made themselves subject to the ship's internal discipline: *in re Ross*, 140 U.S. 453, in which the punishment by the United States consular court in Japan of a British sailor forming part of the crew of a United States ship was upheld by the supreme court.

executive or by its judicial department as the constitution may require) will have to decide between them, and thus it may be said from one point of view that the foreign jurisdiction is only admitted by concession. But from what in our judgment is a more correct point of view it should be described as based on an international right, which cannot be ignored though for its full enjoyment it may require the action of some authority bound to apply principles in good faith[1].

When a disturbance occurs on board a foreign private ship, and the local authority treats it as beyond its jurisdiction, that authority ought, if required, to lend assistance to the captain or consul in support of his jurisdiction. To permit anarchy must always be a breach of its duty. This rule has however to be considered in connection with the question of slavery. A private ship in territorial waters is not an asylum—we need not say for common criminals, for whom a public ship is not an asylum—but not even for political refugees or slaves escaping to her. If she brings persons who by the law of her state are slaves into a port of a country where slavery is not allowed, the local authority will not be justified in inciting them to rise, but it will not be bound to assist the captain or consul in holding them down. The moral objection will override the general rule of assistance. If they rise, the local authority should warn the ship to leave its waters; and if she cannot or does not leave them it may be under the necessity of interfering in order to put a stop to anarchy, in which case the slaves will practically be freed[2].

[1] See what we have said, p. 191, on the predominant (not exclusive) part which the geographical sovereignty of the littoral state gives it in deciding on new cases. And consider the analogy between this matter and those, as extradition and the navigation of international rivers, on which we have maintained the doctrine of imperfect rights.

[2] Mr Bates, a highly respectable merchant of United States nationality, employed as umpire between his country and Great Britain in the case of *The Creole*, gave in 1853 a judgment too favourable to slavery. See Moore's *International Arbitrations of the U.S.A.*, p. 410. In *Scott's Cases on I. L.*, p. 255 (Freeman Snow, p. 138), an opinion of Dana on that judgment is quoted agreeing with what is said in our text.

Diplomatic Immunities from Jurisdiction: Exterritoriality.

We have now to consider the limits of national jurisdiction with reference to the persons composing legations, whether embassies or of inferior rank, and their suite, and to the houses and precincts occupied by them. A legation is not like a ship, a scene on which the quasi-territorial authority of a state is habitually exerted, so that its occasional presence within foreign geographical limits exhibits the interpenetration of two jurisdictions resting on similar principles, a *modus vivendi* between which must therefore be found. The members of a legation merely have a certain personal character which makes it necessary or convenient for the intercourse of states that they should enjoy a certain immunity from the territorial jurisdiction of the country in which their diplomatic functions require them to reside, and the suite and precincts of a legation merely enjoy certain privileges auxiliary to those of the members and to the quiet indispensable to the performance of their duties by the latter. Historically these exceptional rights cannot be traced to a single source. The inviolability of ambassadors is a principle known even to savages, but it belongs to a state of war, to which without it a termination would be difficult, or to a state of such peace as may exist among savages, in which the approach of members of another tribe is not freely permitted. When so much civilisation has been attained that all foreigners are inviolable except so far as they may be arrested under process of law, the inviolability of ambassadors in time of peace means no more than the special immunity from such process which is accorded to them, although it is probable that the sanctity with which the older notion fenced them may have helped to give that immunity a larger measure than for diplomatic purposes is necessary. A contributory cause has been the jealous dignity of the sovereigns of monarchical states, whose persons are deemed to be represented by ambassadors, while the latter have set the measure of the professional privileges shared by diplomats of lower rank though only agents for business. Then came the desire to find a juridical ground for privileges already enjoyed, which led to the fiction that the

precincts of a legation are part of the territory of the state which sends it, and consequently to the term "exterritoriality," indicative of absence or exclusion from the geographical territory, being used to describe the legal position of diplomats and their precincts. The logical result of that fiction would be to give the ambassador and the state represented by him a larger authority within the precincts than even a sovereign has ever had in the quarters occupied by him when travelling; at the same time the fiction is unnecessary for holding that a diplomat's domicile is unchanged by his mission, that conclusion following, on the common principles about domicile, from the nature and precarious duration of the mission. This being now recognised, exterritoriality is no longer used as a starting-point for deductive reasoning by which diplomatic immunities may be measured: it is an expression which sums them up as they exist. The same expression is also often used for the legal position of foreign ships in territorial waters, but since that is not the same as the diplomatic position it seems better to reserve it for the latter, in connection with which the term was first used.

The first point to be noted about diplomatic immunities is that they are an affair between the state which sends the legation and that which receives it: ambassadors passing through third states can claim from them no more than courteous treatment and such facilities for their mission as they can grant without damage to themselves, and ambassadors falling into the hands of enemy states may be treated by them as other enemies may be. Accordingly no complaint could be or was made when in 1744 the Maréchal de Belleisle, charged with an embassy from France to Prussia, was arrested in crossing the electorate of Hanover, allied with England in war against France, and sent to England as a prisoner of war. And in 1854 the French government was ready to allow Mr Soulé, the United States minister accredited to Spain, to pass through France on his way to his post, but not, on account of his antecedents, to make any stay in the country. If the third state which has the power of affecting an ambassador is the enemy, not of his state, but of the state to which he is sent, it must not impede the exercise of his functions without urgent military necessity or the existence of grave reason for suspecting the sincerity or discretion of his

conduct or of that of his state towards it. The accrediting as well as the receiving state is interested in those functions, and that they may prove beneficial to the latter will not justify their interruption to the prejudice of the former. During the siege of Paris in 1870 the German authorities announced their intention to give passage to the despatches of the foreign ministers shut up in that city only if they were open. The ministers, and the United States whose minister was one of them, protested, but the representative of the United States, to whom the protection of Prussian subjects at Paris had been entrusted, was alone allowed to receive and send his despatches sealed. The correspondence between Washington and Germany on the subject, and on some detention of the despatches, does not seem to betray any serious difference as to the principles. It is true that Mr Fish wrote that "the rights of legation under such circumstances must be regarded as paramount to any belligerent right." But he added, somewhat inconsistently: "they ought not to be questioned or curtailed unless the attacking party has good reason to believe that they will be abused, or unless some military necessity, which upon proper statement must be regarded as obvious, shall require the curtailment." And Count Bismarck wrote to the minister in Paris: "the delay occurring now and then in the transmission of your despatch bag is not occasioned by any doubt as to the right of your government to correspond with you, but by obstacles which it was out of my power to remove." The obstacle which he mentioned was a rule adopted by the general staff of the German army that no sealed packages or letters should pass through their lines in either direction without a stoppage of several days[1].

[1] 1 Wharton's *Digest*, § 97; both for this and for Mr Soulé's case; 1 Calvo, § 602, for the case of 1870. Grotius does not seem to have thought that any particular consideration was due to the embassy of a friendly state. In laying down the rule that third states are not obliged to treat ambassadors as inviolable, he classes together the cases *siquidem ad hostes eorum eunt aut ab hostibus veniunt*: l. 2, c. 18, § 5. It must be noticed that, contrary to the opinion which we have expressed in the text, the judges of the state of New York have extended the diplomatic immunity from civil suit to the diplomatic agents of foreign powers passing through the state on their way to the countries to which they are

Coming now to what is due from the state receiving a mission, we will take first what is due to the members of it who belong to the diplomatic service in any rank, down even to that of attachés. These are exempt from the criminal jurisdiction of the territory. That indeed was a moot point in the time of Grotius, though the differences which he mentions were probably more in theory than in practice[1], but a century later we find it to be a settled practice, in accordance with his opinion, that an ambassador, even guilty of conspiracy against the government to which he is accredited, can only be sent away, or at most arrested and detained until it is known how his government will treat the affair[2]. This was done, and the papers of the delinquent were examined, by England in 1717, when the Swedish ambassador, Count Gyllenborg, engaged in a Jacobite conspiracy[3], and by France in 1718, when the Spanish ambassador, the Prince of Cellamare, organised a conspiracy against the regent[4]; and on each occasion the diplomatic world was generally satisfied of the correctness of the proceeding, the only dissent expressed when the facts were known being that of the Spanish ambassador to Great Britain in the former case.

accredited: *Wilson* v. *Guzman Blanco*, 56 N. Y. Superior Court 582. They have on their side, among other authorities, Wheaton (*Elements*, §§ 246, 247—Dana's numbering) and Twiss (*Law of Nations in Time of Peace*, § 222), who speak of a sacred character, Wheaton also assimilating an ambassador on his route to a travelling sovereign. But Bynkershoek (*de Foro Legatorum*, c. 9) is against them, and immunity from suit is not necessary to inviolability, even were an ambassador in a third country more inviolable than any one else now is.

[1] Queen Elizabeth was advised in the case of the bishop of Ross, ambassador of Mary queen of Scots, by English lawyers, that an ambassador conspiring against the sovereign who had received him, might, and in the case of Mendoza, ambassador of Spain, by Albericus Gentilis and Hottoman, that he might not be punished by that sovereign. Both were sent away. 2 Ward's *Enquiry into the Foundation and History of the Law of Nations*, 487, quoting Burleigh's State Papers for the bishop's case; and 523, quoting Zouch, *Solut. Quæst.* 130, for Mendoza's case.

[2] Grotius, l. 2, c. 18, § 4. He says that in case of extreme necessity *et retineri et interrogari legati poterunt.* This would not be so in England where the interrogation of accused persons is unknown.

[3] Martens, 1 *Causes Célèbres*, 75.

[4] *Ib.* 139.

As to the civil jurisdiction of the country to which a mission is accredited, the facts that its members do not acquire a domicile in it by their diplomatic residence and that they very seldom belong to its nationality prevent a large part of the possible causes of suit against them from falling within that jurisdiction. The Institute of International Law has expressed the opinion that where they do possess that nationality they ought not to be able to claim immunity from suit, but it has been held in England that a British subject received as a member of a foreign mission will have the privileges of exterritoriality so far as the government has not expressly excluded them in its reception of him[1]. Where a suit would be entertainable against an ordinary person notwithstanding his foreign domicile and nationality, distinctions may be drawn.

It is generally admitted that a diplomatic person is exempt from the territorial jurisdiction on engagements contracted by him either in his official capacity, or in a purely private as distinguished from a mercantile or professional capacity, and that so much of his property, movable or immovable, as is necessary to his dignity and comfort cannot be seized for any debt. But opinions and the practice of courts differ as to points beyond these, and since in such circumstances no international agreement can be asserted the question is one for national law, on which we cannot here enter into details. It is enough to say that in England the widest views as to diplomatic immunity are adopted. The st. 7 Anne, c. 12[2], which is the most formal document we have on the subject, declares the goods of an ambassador or other public minister without limitation to be incapable of distraint or seizure, and makes no exception on the ground of trade to his immunity from suit, but only excludes from the benefit of the act any person "within the description of any of the statutes against bankrupts who shall put himself into the service of any such ambassador or public minister." And though in one case it seems to have been thought,

[1] 14 *Annuaire,* p. 244; art. 15 of resolutions of 1895. *Macartney* v. *Garbutt,* L. R., 24 Q. B. D. 368.

[2] This act was passed in consequence of the ambassador of the Czar being arrested, and has always been considered in England as declaratory and not innovating.

somewhat doubtingly, that a foreign minister who engages in commercial transactions may be made a nominal defendant to a suit "merely for the purpose of ascertaining the liability of the other defendants," no attempt being made to enforce against him any judgment which may be obtained[1], a later case decides against that view[2]. Again, although Wheaton says that "the hotel in which [a foreign minister] resides, though exempt from the quartering of troops, is subject to taxation in common with the other real property of the country, whether it belongs to him or to his government[3]," yet it has been held in England that the payment of local rates cannot be enforced by suit or distress against a member of a mission[4], and the same would no doubt be held in the case of national taxes.

A further immunity which may be noticed is that a foreign minister "is exempt from the payment of duties on the importation of articles for his own personal use and that of his family. But this exemption is at present, by the usage of most nations, limited to a fixed sum during the continuance of the mission. He is liable to the payment of tolls and postages[5]."

The immunity of a diplomatic person from jurisdiction includes his not being compellable to give evidence in court, and this privilege is usually insisted on in practice, though such

[1] *Taylor* v. *Best*, 14 C. B. 487.

[2] *Magdalena Steam Navigation Company* v. *Martin*, 2 E. and E. 94. "If the ambassador has contracted jointly with others, the objection that he is not joined as a defendant may be met by showing that he is not liable to be sued": p. 115.

[3] *Elements*, § 242, Dana's numbering. As to the enforcement of liens on the effects of a diplomatic person, it will be useful to refer to the dispute which Wheaton had at Berlin about the enforcement of a lien on his furniture for rent due for his dwellinghouse, which he recounts and argues at great length: *ib.*, §§ 227—241. He admits, however, § 227, that "any other real property or immovables [besides his dwellinghouse] of which he may be possessed within the foreign territory is subject to its laws and jurisdiction. Nor," he says, "is the personal property of which he may be possessed as a merchant carrying on trade, or in a fiduciary character as an executor &c., exempt from the operation of the local laws."

[4] *Parkinson* v. *Potter*, 16 Q. B. 152; *Macartney* v. *Garbutt*, L. R., 24 Q. B. D. 368.

[5] *Elements*, § 242.

persons are usually ready when their evidence is required to make declarations on oath out of court, refusing to be cross-examined on them[1]. Whether any use can be made of such declarations against a person on trial, or otherwise in a suit, must depend on the national law of the country in which the proceedings are taken.

If the result of his diplomatic immunities should be that a member of a foreign mission should not pay his just debts, complaint must be made to his government. In 1772 the French government refused to give to the Baron de Wrech, minister plenipotentiary of the landgrave of Hesse-Cassel, the passports necessary for his quitting Paris, until the landgrave made an arrangement with his creditors[2].

Diplomatic immunities are not enjoyed by consuls resident in states of European civilisation. They are only agents for their governments so far as these are concerned with the affairs of individuals, and have no part in the political or even the general commercial representation of their states, which is carried on by a different description of functionaries; but in the east Christian powers have appointed consuls with a diplomatic in addition to their properly consular character, and such accordingly have the privileges belonging to their higher employment. Even in the European and American world consuls are occasionally attached to legations as members or assistants, and will then have the immunities proper to such service. It is in this sense that the position of consuls is now generally settled, notwithstanding various attempts, chiefly by France or French writers, to rate it higher[3].

[1] *Dubois' Case,* which occurred in 1856 at Washington: Lawrence's *Wheaton,* p. 393, note 127; 1 Wharton's *Digest,* § 98. The Venezuelan minister, by the instructions of his government, gave evidence in court on the trial of the murderer of President Garfield, out of respect for his memory and friendship to the United States: *Guiteau's Case*; 1 Wharton's *Digest,* § 98. In *Dillon's Case* (*ib.*), the question arose in the United States whether a French consul enjoys the diplomatic freedom from being compelled to give evidence, and was practically settled in favour of France, which country rates consuls high.

[2] Martens, 2 *Causes Célèbres* 110.

[3] 1 Calvo, §§ 459, 460. See *Dillon's Case,* mentioned in note 1 on this page. England and the United States have always maintained this view

Besides the persons who are on the diplomatic staff of the mission, immunity from the territorial jurisdiction, civil or criminal, is generally enjoyed by those who are living with them as part of their family or household, and to those who are in their fixed service, as distinguished from persons, such as workmen, occasionally employed by them. But the service must be real and not colourable[1], and the immunity will not extend to matters quite unconnected with the service[2]; also the ambassador or minister may waive the immunity of any one not on the diplomatic staff, but not his own or that of a member of the mission, their immunity being the right of their state[3]. He usually furnishes to the local authorities a list of the members and suite of his mission, but to be named on such a list "is no condition precedent to the being entitled to the privilege of a public minister's servant[4]." An attempt made by the court of Bavaria in 1790 to assert the local jurisdiction over persons in attendance on the members of a mission did not succeed in attracting sympathy[5]. The exception which obliged us to limit our statement of the foregoing by the word "generally" is that in England an exemption from the local criminal jurisdiction is not allowed to any one not on the diplomatic staff. Thus in 1653, under Cromwell, Don Pantaleon Sa, brother of the Portuguese ambassador, was tried and executed for murder; and

of the position of consuls: *Buvot* v. *Barbut*, or *Barbuit's Case*, Cas. Temp. Talbot 281, quoted with approval by Lord Mansfield in *Triquet* v. *Bath*, 3 Burrows 1480, and in *Heathfield* v. *Chilton*, 4 Burrows 2016; *Clarke* v. *Cretico*, 1 Taunt. 106; *Viveash* v. *Becker*, 3 M. and S. 284; *Commonwealth* v. *Kosloff*, 5 Serg. and Rawle (Pennsylvania) 545; Mr Justice Story in *The Anne*, 3 Wheaton 445.

[1] *Triquet* v. *Bath*, 3 Burrows 1478; *Lockwood* v. *Coysgarne*, 3 Burrows 1676; *Heathfield* v. *Chilton*, 4 Burrows 2015; *Fisher* v. *Begrez*, 1 C. and M. 117, 2 C. and M. 240; *in re Cloete*, 65 L. T. 102.

[2] In *Novello* v. *Toogood* a chorister of the Portuguese ambassador was held liable to distress for poor rates in respect of a house in which, and not in the ambassador's house, he lived, and in which he let lodgings: 1 B. and C. 554.

[3] *U.S.* v. *Benner*, Bald. 234, quoted in Scott's *Cases on International Law*, p. 196.

[4] Lord Mansfield in *Heathfield* v. *Chilton*, u.s., Justice Ashton concurring.

[5] Martens, 2 *Nouvelles Causes Célèbres*, 22.

in 1827 the Foreign Office justified the arrest of the coachman of Mr Gallatin, the United States minister, for an assault, although the arrest was made in the minister's stable, only admitting "that courtesy requires that their houses [those of foreign ministers] should not be entered without permission being first solicited, in cases where no urgent necessity presses for the immediate capture of an offender[1]."

The Precincts of Legations: Asylum in them.

It is with reference to the precincts of legations that the fiction of exterritoriality the most ran riot. Large quarters of cities were sometimes included in those precincts, and every inference was practically drawn which could follow in logic from their being held to be parts of the ambassador's country. No process of the territorial law could be executed in them, and hence they became the refuges and haunts of criminals and debtors, an Alsatia. On the other hand the foreign sovereign and his ambassador were held to have in them a jurisdiction which, from the want of means to organise it, could not remedy the mischief, even were it not an offence to the territorial power for which logic could not atone. As late as 1867, a Russian subject, Mickilchenkorff, having committed an attempt to murder in the Russian embassy at Paris, and having been arrested and his prosecution commenced by the French authorities, the ambassador disputed their competence and claimed his extradition. But such a notion was quite antiquated, and the French government refused to admit that the fiction of exterritoriality could have such a scope, independently of the fact that on the occurrence of the outrage the Russians had themselves called for the aid of the local force[2]. One of the first influences to effect a breach in the old system was the desire of the power represented not to make its legation the harbour for rebels and conspirators against the territorial sovereign, a desire founded on mutual courtesy and on a sentiment of the solidarity of governments; and thus political refugees, in whose favour the last vestiges of the system now exist, were among the first to be

[1] Lawrence's *Wheaton*, p. 1006; 1 Wharton's *Digest*, § 94.

[2] 1 Calvo, § 571.

denied its advantage. In 1726 the Spanish government forced an entrance into the British embassy at Madrid in order to arrest the duke of Ripperda, the surrender of whom and of his papers had been refused[1]; and in 1747 the Swedish government used such means of annoyance, short of a violent entry, to obtain the possession of Springer, accused of treason, who had taken refuge in the British embassy at Stockholm, that the ambassador surrendered him under protest[2]. His government supported that protest, without effect, and, since no one would now treat common criminals with more indulgence than political ones, these two cases may be considered to have settled the rule of international law as not allowing an asylum in legations to accused persons of either class. Nevertheless such an asylum is in practice allowed from time to time in Spanish America, and has been given in Europe as late as 1862 in Greece and 1873 in Spain. Humanity has triumphed over the law, and not altogether without approval in the countries concerned, in which the victors do not know but that their turn for availing themselves of foreign hospitality may soon come. The United States have done their best, so far as instructions from Washington may go, to put an end to the practice; but the pressure of circumstances has been too great for either their or the British diplomats, and even consuls, on the spot to resist it. We may hope that the marked improvement which has taken place of late years in the political stability of the states in which asylum has been given will allow the practice to fall into desuetude[3].

In non-political matters, and in political ones where revolution is not so frequent as to be almost a recognised form of opposition, the exterritoriality of the precincts of legations has now in this country only a very limited range of operation. Where a person is not protected from suit by any personal diplomatic immunity, nothing will prevent his being ultimately reached by the territorial jurisdiction, though the convenience of the minister must first be consulted as to the time and mode of effecting an arrest or serving process within the legation premises. In the last resort what was said by Lord Dudley,

[1] Martens, 1 *Causes Célèbres*, 174.

[2] *Ib.*, p. 326.

[3] Hall, § 52, with the notes, is worth consulting.

secretary of state for foreign affairs, in the case of Mr Gallatin's coachman before referred to, will apply: "with respect to the question of the supposed inviolability of the premises occupied by a foreign minister, I am not aware of any instance, since the abolition of sanctuary in England, where it has been held that the premises occupied by an ambassador are entitled to such a privilege by the law of nations." The same view was stated by the court of appeal of Rome in a judgment of 30 August 1899, in which, while denying exterritoriality to the Vatican, the conclusion drawn from it, had it existed for that palace, was thus repelled: "the hotels in which [foreign sovereigns and persons entitled to diplomatic immunities] reside are not the less considered as a part of the national territory, and...penal justice has the right and the means of following criminals, in case of urgent necessity, into the places which enjoy an indirect immunity[1]." But in some countries the inviolability seems to have more vitality. The Institute of International Law resolved that "no agent of the public authority, administrative or judicial, can penetrate into the hotel of a minister for the performance of his functions without the express consent of the minister[2]." If the minister raised undue difficulties, such a rule would necessitate a reference to his government, causing a delay which in some cases might defeat the ends of justice. The question is one in which there is no international agreement that can be opposed to the national law and jurisdiction.

[1] 31 *Journal du D. I. P. et de la J. C.* 215, quoting *Monitore dei Tribunali,* 1900, p. 339.

[2] 14 *Annuaire,* p. 242.

CHAPTER XII.

DIPLOMACY.

Diplomatic Agents.

States, like other ideal bodies, can only negotiate and contract with one another by agents, except in the case of monarchical states identified with their sovereign rulers; and since in modern methods of government even the most autocratic sovereigns do not personally conduct binding negotiations, the physical necessity of employing agents for the purpose is merely replaced for them by an equally cogent practical necessity[1]. The right of embassy or diplomatic representation which is often said to belong to states is, therefore, not really separable from their right of contracting: the former must exist if the latter does. The minister of foreign affairs of a state is its standing diplomatic agent for business transacted at its court. That a person may be a diplomatic agent for business transacted with and at other courts he must be accredited by the one state

[1] The Holy Alliance, signed by the sovereigns of Russia, Austria and Prussia on 26 September 1815, and to which most of the other European sovereigns acceded, is scarcely an exception to what is here said. It was a vague and mystical statement of the Christian principles by which the monarchs agreed to be guided, and so far was it from containing definite and really binding stipulations that its practical purport (if indeed it had any) can only be gathered from the policy which was afterwards followed by its authors, and which is commonly called from it that of the Holy Alliance. Even such as it was, the Prince Regent of England refused to become a party to it without the signature of a responsible minister, though he stated that he personally agreed with its sentiments, as well he might, so long as all that could be known of them was what appeared in the document.

and received as such by the other; and the purpose of his mission would be defeated or at least its utility impaired if he was not an acceptable person, *persona grata*, to the latter. If the latter state declines to receive him, or objects to the continuance of his mission, on frivolous grounds, it will give just cause of offence to his state, which will protect its dignity and interests by appropriate measures, among which the dismissal of the ambassador or other representative of the offending state is sometimes employed. But however groundless may be the objection taken to an individual he will not be a diplomatic agent unless received as such, nor longer than he continues to be so received, although he will enjoy his immunity from the territorial jurisdiction of that state during a reasonable time while travelling through its territory, both on entering it in order to present his credentials and on leaving it, whether on the termination of his mission or, if the case should arise, after he has been refused reception or dismissed. In the case of negotiators at a congress or conference these rules have to be slightly modified. Those negotiators are not, as such, accredited to the state in which the meeting takes place, although the permanent diplomatic agents at that court are usually included in the representation of their respective states at the meeting. The reciprocal examination of their powers by the members of the congress or conference amounts to a virtual accrediting of them all round, and to a virtual or presumed acceptance of them all round: in a common negotiation between many states it would be very inconvenient that personal objections should be raised by single states. And correspondingly the diplomatic immunities from territorial jurisdiction will attach in favour of all the members of the congress or conference, as well during its sitting as during their reasonable travel to and from the place of meeting through the territories of all the states represented, no one of which can be considered as a third or outside party.

Diplomatic agents are classified in rank and precedence by rules made at the congresses of Vienna (1814) and Aix la Chapelle (1818). The first class consists of ambassadors, among whom were formerly the legates and nuncios of the pope, respectively his special and ordinary resident ambassadors. The pope having lost his temporal power, his legates and nuncios are

no longer ambassadors in the same sense as those of states, but they retain their rank in the first class. The second class consists of envoys and ministers plenipotentiary, the third of ministers resident; and these three classes are accredited to the sovereign monarch or other head of the state. The fourth class is that of *chargés d'affaires*, who are only accredited to the minister of foreign affairs; and these are either *chargés d'affaires ad hoc*, "sent out originally with express credentials as such," or *ad interim*, "promoted temporarily to that position, as members of an embassy or legation, during the absence or inability of their chief[1]." "The classification," as Hall says, "is of little but ceremonial value; the right which ambassadors are alleged to possess, of treating with the sovereign personally, having lost its practical importance under modern methods of government[2]."

Consuls have no diplomatic character[3], nor have commissioners sent for special objects. Among the latter are persons employed in the exercise of the right thus expressed by Earl Russell in his despatch of 26 Nov. 1861 to Mr Adams: "states may lawfully enter into communication with *de facto* governments, to provide for the temporary security of the persons and property of their subjects." Such communications do not amount to a recognition of the *de facto* government as a state, or, if the case be one of a revolution in a state already recognised, to a recognition of the new form of government[4]. But in the latter case, if the communications are carried on through representatives who were accredited to the old authorities, they will retain their diplomatic character and immunities pending the accrediting them to the new ones. Much the commonest employment, however, of commissioners for special objects is unconnected with insurrection or revolution, being for the transaction of administrative business concerning special departments of government, as the post office, or on special occasions, as universal exhibitions.

"Persons carrying official despatches to or from diplomatic agents have the same rights of inviolability and innocent passage

[1] Taylor, § 280.

[2] § 98.

[3] See above, p. 269.

[4] See Geffcken's Heffter, § 222; and above, pp. 50, 59.

that belong to the diplomatic agent himself, provided that their official character be properly authenticated. It is usual to provide this authentication in the form of special passports, stating in precise terms the errand upon which they are engaged[1]."

A few words will not be out of place on consuls, if only to mark more clearly the difference between them and diplomatic agents. Their functions will be understood from the headings of the chapters in the *General Instructions for H. M.'s Consular Officers*, 1893: Mercantile Marine, Trade and Commerce, Quarantine and Cattle Disease, Assistance and Advice to British Subjects, Relief of Distressed British Subjects, Care of Property of British Subjects and of Deceased British Subjects, Passports, Notarial Duties, Marriages[2], Registration of Births and Deaths, Royal Navy, Foreign Navies (of course only to the extent of sending reports and intelligence) and Slave Trade. All the functions thus pointed to are administrative ones in the interest of the consul's state or of its subjects, and the only allusion to the exercise by the consul of any jurisdiction, namely to that over the persons on board a ship of his country in port, in matters purely internal to the ship[3], is so made as not to claim it of right. Thus it is said that "consular officers are not entitled to any rights, privileges, exemptions or immunities, except those defined by treaty and those regulated by local law or custom." And: "the discipline on board a British merchantship while in a foreign port is usually allowed to be regulated by the master in conformity with English law, and it is desirable that he should be supported in maintaining it.

[1] Hall, § 104*.

[2] The celebration of marriages in consulates and legations can only take place when the law of the consul's or diplomatic representative's country allows it. When Great Britain is that country, such law is contained in the Foreign Marriage Act 1892 and the Foreign Marriages Order in Council 1892. And even then it will depend on the doctrines of private international law (see above, p. 239), as understood and practised in each country, what validity the marriage so celebrated will have in countries other than that of the consul or diplomatic representative. No general recognition of the international validity of marriages celebrated in consulates or legations has a place among those doctrines.

[3] See above, pp. 259 and 261, note.

Consular officers should assist shipmasters in this respect, warning them however of any local rules or regulations which might interfere with their freedom of action[1]." Indeed, though the jurisdiction of the ship's master in purely internal matters, exercised as it can be without stepping off her quasi-territorial deck, is a part of received international law, with the principles of which it is in conformity, the same cannot be said of any intervention by the consul, an officer on a foreign shore. Even could it be asserted that such intervention was universally allowed, still the state which was the sovereign of the soil would in the absence of treaty have an imprescriptible right to forbid it. For the rest, a consul cannot enter on the execution of any part of his office until his appointment has received the sanction of the government of the territory, which is usually given by an *exequatur*. When that sanction has been given, as it is a business matter devoid of political significance, it will remain in force without need of renewal if a revolution should bring about a change of government.

The consuls who exercise a large jurisdiction in Turkey, China and other countries of non-European civilisation fall strictly under what has here been said, their special rights and position being always the fruit of treaties, elaborated by a practice which through acquiescence has acquired an authority interpreting the treaties. The system so established is sufficiently uniform to be capable of treatment as a branch of practical international law, but it concerns private interests and could not be usefully treated without much detail. Public interests are only touched so far as consuls in the countries referred to are invested with diplomatic functions, which is often the case, and then the general rules of international law apply. The consuls who exercise British jurisdiction and other authority in colonial protectorates have no connection beyond the name with the consuls spoken of in this section. They do not act in the dominions of a foreign state, but are the exclusive functionaries within the geographical range of their appointment.

[1] *General Instructions* &c., pp. 87, 89.

Treaties and other International Contracts.

It is unnecessary here to enter into the general principles of the law of contract: what is important for us is to notice the points in which contracts between states present any exception to those principles or any peculiar application of them. First then the rule that a contract presupposes the free will of the parties, and is void when obtained by force or intimidation, is applicable to any force or intimidation practised on the contracting agent of a state, but not to what is practised on the will of the state itself. If it were not so, no valid treaty of peace could be extorted by a successful war. But the rule that a contract is vitiated by fraud applies, subject to the observation that some latitude must be allowed in negotiating treaties of peace to the right of misleading an adversary which is incident to war. One who while the negotiation continues is still an enemy cannot be expected to abstain from misstatements bearing on his probable means of victory, which he was entitled to employ yesterday, and which if the negotiation fails he may find it necessary to repeat tomorrow. But states at peace are subject as moral beings to the duty of truth, and there are frauds which could not be tolerated even between states at war, such as the production of forged maps on questions of boundary.

The contracts of states are not tied to any form. The essential is that they shall be concluded with the assent of the contracting authority of each party, which is usually the chancellor, minister of foreign affairs, secretary of state or grand vizier, for all of whom foreign minister may be taken as a general expression, although in the United States the senate shares that authority, and occasions may arise in which it is wholly vested in a national assembly. When the contract is drawn up in a formal shape, like that of a deed or notarial act between private persons, it is called a treaty or a convention. The terms are synonymous, and even the usage of calling the more important acts treaties, the less important ones conventions, is far from being uniformly followed. Such an act always needs ratification by the contracting authorities of the parties, whether, as is now usual, that necessity is expressly reserved in the treaty or not. This rule is as old as Vattel, though in the time of

Grotius it was thought that a diplomatic representative bound his constituent by whatever agreement he concluded within the terms of his credentials[1]. The actual rule is equivalent to saying that credentials, however expressed, and notwithstanding the implication of full powers contained in the name plenipotentiary, empower the representative to nothing more than to negotiate and to conclude provisionally. The contracting authorities, of whom only one can in general be present at the court where the treaty is signed, reserve to themselves the power to conclude finally. The ratification may be refused by any party, and although this would be offensive if done without grave reason, it is impossible to limit the right of doing it, and there are sufficient examples of its being done even by foreign ministers who all along had control over the negotiations. Where the contracting authority is shared by a body having no such control, as the senate of the United States, refusal of ratification may result from the exercise of independent judgment and is very natural. Such a body will occasionally attempt to qualify its ratification by a modification of the terms of the treaty, but such a proceeding is nothing more than the proposal of a new treaty which may or may not be accepted. The discussions which take place in congresses or conferences are recorded in protocols, in which it often happens that the representatives of the parties have caused reservations made by them, or interpretations placed by them on the terms adopted, to be entered. The subsequent signature of the resulting treaty will prove that those reservations or interpretations were accepted by the other negotiators, and a simple exchange of ratifications will leave the benefit of them to the party on whose behalf they were made. But if a party attempts to make a reservation or interpretation by its ratification, the case will be the same in principle as that of a ratification in which it is attempted to modify the terms of the treaty, and it will be for the other parties to determine whether they will sanction the attempt by carrying out the exchange of the ratifications.

When the ratifications of a treaty have been exchanged, it operates as to public rights retrospectively from the date of its

[1] Grotius, l. 2, c. 11, § 12: Vattel, l. 2, c. 12, § 156.

signature, which is also that named as the date of the treaty in quoting it; and even before the exchange "stipulations, the execution of which during the interval between signature and ratification has been expressly provided for, must be carried out subject to a claim which the party burdened by them may make, to be placed in his original position or to receive compensation if the treaty be not ratified by the other contracting state[1]." Indeed in treaties of peace, when ratification by no authority which has not been concerned in the negotiation is needed, such an immediate commencement of execution will often be very beneficial. But when such an authority as that referred to has to be called in, private persons can neither act on the assumption that its independent opinion will agree with that of the negotiators, nor can they be expected to suspend their operations. And it has accordingly been held in the United States, with reference to a private transaction which took place while a treaty was before the senate, that "to construe the law so as to make the ratification of the treaty relate back to its signing, thereby divesting a title already vested, would be manifestly unjust and cannot be sanctioned[2]."

Contracts between states are often concluded not in the shape of a treaty or convention, but in that of an exchange of notes, these being usually signed by the foreign minister of the country in which the negotiation is carried on, and by the ambassador of the other country. In such cases the foreign minister of the latter country also has usually been a real party to the negotiation, by his despatches addressed to his ambassador and communicated by him to the other side; and the very terms of the notes to be exchanged have usually been settled in that correspondence. The result therefore is that at which the two contracting authorities have already arrived, and there is no need of ratification, nor is such a formality used. Again, the international agreement may be in the form of a declaration signed by plenipotentiaries assembled in conference, as in the case of the Declaration respecting Maritime Law signed at Paris on 16 April 1856. On that occasion the foreign ministers of all the concurring powers except Russia were among those who

[1] Hall, § 110.

[2] *Haver* v. *Yaker*, 9 Wallace 32.

signed, and Count Orloff, who on the 14th had stated that he must refer to his court before expressing the opinion of the Russian plenipotentiaries, made known on the 16th that he had received the instructions of his court. Another form is that which was employed for the St Petersburg declaration of 11 December 1868, prohibiting the use in war of explosive bullets of less weight than 400 grammes. That document did not issue from a conference, but it recited that the signatories had been authorised by the orders of their governments to make the declaration. In neither of these cases could there be any question of ratification, the concurrence of the highest contracting authorities of the states which were parties being otherwise assured. If any form of international agreement can be imagined in which or as a preliminary to which the assent of the highest contracting authorities has not been assured, it will require, like a treaty, to be ratified in some manner by their subsequent assent.

The interpretation of treaties has been considered at much length by many writers on international law, and rules on it have been suggested which in our opinion are not likely to be of much practical use[1].

The important point is to get at the real intention of the parties, and that enquiry is not to be shackled by any rule of interpretation which may exist in a particular national jurisprudence but is not generally accepted in the civilised world. On the whole we incline to think that the interpretation of international contracts is and ought to be less literal than that usually given in English courts of law to private contracts and acts of parliament. In the first place, English drafting is more minutely careful, and correspondingly English interpretation is more literal, than is common in those countries to which most of the ministers and diplomats who are responsible for the wording of international contracts belong. And secondly, the nature of the matters dealt with by those eminent functionaries, and the peculiar conditions under which they work, must be considered. A style of drafting accommodated to the expectation of a very literal interpretation would necessitate the suggestion

[1] Hall, §§ 111–113, is copious on this subject, and his discussion of it and the cases to which he refers afford much matter for reflection.

and discussion of so many possible contingencies, as would be likely to cause needless friction between the representatives of countries not always very amicable. It seems best in the interest of peace that, when an agreement on broad lines has been reached, it should be expressed in language not striving to hide a felt doubt, but on the other hand not meticulously seeking occasions for doubt; and to such a style of drafting, which we believe to be that most common in treaties, a large and liberal spirit of interpretation will reasonably correspond. Perhaps no better instance can be given of the difference between the two modes of interpretation which we have in mind than this. State A has concluded with state B a treaty on tariffs containing what is known as the most favoured nation clause, promising to B the benefit of lower duties conceded to any other state. A then concludes with state C a treaty which, for some valuable consideration, concedes to it lower duties on certain articles than are provided in the treaty with B. Can B demand the admission of its goods at the same rates of duty as those of C? On a literal system of interpretation it can, but on the broader system it cannot, unless the case admits of its giving to A the same consideration that is given by C, and it is willing to do so. The latter answer has been made by the Supreme Court of the United States[1], and in our opinion justly.

The classification of treaties has exercised many writers on international law no less than their interpretation, but the only class to which it seems necessary here to refer is that of transitory or dispositive treaties, which have already been mentioned in connection with the continuity of states through changes of territory[2], but of which a larger view must now be taken. The dispositive character of a treaty may be shown by its vesting rights in individuals as well as by imposing a servitude on territory; and the rights so vested will continue to exist notwithstanding the outbreak of war between the states which made the arrangement, and notwithstanding the transfer of the population enjoying the rights to another sovereignty by conquest or cession. Thus the right which was reciprocally given by the treaty of 1783 to the then owners of land in the

[1] *Whitney* v. *Robertson*, 124 U.S. 190.

[2] See above, p. 60.

United States and the British dominions and their successors in title, to enjoy such ownership notwithstanding their being aliens, was not destroyed by the outbreak of war between the two countries in 1812[1]. And we may go a step further, and detect something of the dispositive character in a treaty which vests no right in individuals, but establishes between two states a condition of things intended to be permanent and by which the rights of individuals are affected; for example, by providing for the execution in either country of the judgments of the courts of law of the other country. The mutual rights of the two states are disposed of—a line of demarcation is drawn between the bodies of rights with which they are respectively equipped—and although the outbreak of war between them may interpose practical obstacles to the observation of the line, on the conclusion of peace, if the treaty of peace be silent on the subject, each will reenter on the enjoyment of what may be called the ideal territory assigned to it by the old treaty just as it will reenter on the enjoyment of its physical territory. But, since the dispositive character in such cases operates primarily between the states, the population of a district of which the sovereignty is transferred by conquest or cession will live for the future, as we have seen, under the system which such dispositions have created for the state to which they are annexed, and not under that which existed for their former state[2].

The Obsolescence of Treaties.

Almost all theorists agree that to many treaties the tacit condition *rebus sic stantibus* is attached: they were concluded in and by reason of special circumstances, and when those circumstances disappear there arises a right to have them rescinded. If then, it is argued, the party for whose advantage such a treaty was concluded is inequitably obdurate, the party burdened by it will be justified in treating it as obsolete. Mr Hall, while

[1] *Sutton* v. *Sutton*, 1 R. and M. 663; *Society for the Propagation of the Gospel* v. *New Haven*, 8 Wheaton 464.

[2] As to the effect of the establishment of the German empire on the treaties between the United States and the states included in that empire, see *Terlinden* v. *Ames*, 184 U.S. 270—an extradition case.

reprobating "the growing laxity which is apparent in the conduct of many governments, and the curious tolerance with which gross violations of faith are regarded by public opinion," lays down what he calls "a clear principle" on the subject; and if we cannot subscribe to its clearness, we will give it in order to show how far clearness is attainable. "Neither party to a contract," he says, "can make its binding effect dependent at his will upon conditions other than those contemplated at the moment when the contract was entered into, and on the other hand a contract ceases to be binding so soon as anything which formed an implied condition of its obligatory force at the time of its conclusion is essentially altered[1]." But the question only arises when there is a difference as to what conditions were implied, or were contemplated, not as existent or possible, but as essential. Evidently the right of denouncing a treaty is an imperfect one, demanding for its perfection in any case better definition than in the present state of international law is attainable, but not therefore to be condemned *in toto*, only to be exercised with a grave sense of moral responsibility[2].

Conspicuous among treaties doomed by their nature to obsolescence are those by which a state defeated in war is obliged to abstain from fortifying or otherwise making free use of some part of its territory, when the restriction is not imposed as forming part of a system of permanent neutrality. Art. 3 of the treaty of Paris of 20 November 1815 prohibited the fortification of Huningen by France, not as a part of the neutrality of Switzerland but in order to relieve the city of Bâle from anxiety; and immediately on the revolution of 1848 the French provisional government declared that article to be no longer binding. By art. 11 of the treaty of Paris of 1856 the Black Sea was interdicted to the flags of all powers, with the exception of certain light vessels necessary for the service of the coast and of the mouths of the Danube; and by art. 13 Russia and Turkey engaged not to establish or maintain any military marine arsenal on its coast; but neither Russia nor Turkey was subjected to permanent neutrality. Russia took advantage of the Franco-

[1] § 116.

[2] *Hooper* v. *United States*, quoted in Scott's *Cases on International Law* from 22 *Court of Claims* 408, 416, may be referred to.

German war of 1870 to denounce those stipulations, and they were abrogated by the treaty of London of 13 March 1871, after lip homage had been paid at a conference to the continuing force of treaties not abrogated by the consent of the parties to them. The reader must exercise his own opinion as to the justification in these cases, but he will notice the difference between them and the declaration in art. 92 of the Final Act of the congress of Vienna in 1815, that a certain part of Savoy belonging to the king of Sardinia "shall make part of the neutrality of Switzerland, such as it is recognised and guaranteed by the powers," as well as the provision in art. 3 of the treaty of Paris of 20 November 1815 that "the neutrality of Switzerland shall be extended to the territory" there defined. By these articles a servitude or easement was created in certain districts of Savoy, as a part of a system of permanent neutrality created for the benefit of all Europe, and a power affected by that servitude can no more by its own mere determination put an end to what is recognised as a part of the system than it could to the whole.

We shall have to return to the subject in connection with the political action of states.

CHAPTER XIII.

THE POLITICAL ACTION OF STATES.

Legal and Political Claims distinguished.

We have now considered independent states as possessing sovereignty over territories and subjects, and have traced rules for their conduct in the relations which would arise out of that character even if they carefully restricted themselves to it. Those rules however could not always be reached by deductive reasoning, because the sovereignties of different states must clash so long as their subjects do not confine their travels and their activities within their respective territories. A large portion of authority concerning foreign persons and things is allowed to the internal jurisdiction of states, and in the second part of this work we shall find other considerations coming in with regard to war and neutrality, the total result being the establishment, through the joint effect of reason and custom, of a *modus vivendi* between states. A claim which a state may make on another for a breach of that *modus vivendi*, alleged to have been committed by the latter against the former or one of its subjects, resembles in important respects the claims which the subjects of any state make against one another in its national courts of justice. There is the same reference to recognised rules as the test; we meet in both cases, as we must whenever human action is concerned, with property, contract and tort; the notion of property is further introduced into the claims of states by the analogy which territorial sovereignty has to it; much of the reasoning by which the rules are established, and all the reasoning by which the claims of states on any occasion

are asserted or denied to result from them, is rather juridical than political. These then may be called the legal claims of states, and if we were discoursing of international affairs to an inhabitant of another planet he might suppose that when we had explained them we had covered the whole ground. He might ask what more there was to say than that the independence of states precludes any interference by one of them with another, on any ground other than that of a rule forming part of their *modus vivendi*. But we who have to do with men as they are on the earth know that a large part of the action of states on one another is not confined within those legal limits, but is of the kind known as political action. What then is its relation to international law?

We have already referred to three classes of cases in which political action is justifiable[1]. One is that in which no rule meeting the circumstances has been sanctioned by the consent of the international society. We do not mean only that there is no recognised rule for guiding action in the circumstances, but also that there is no general opinion condemning action in them; for such an opinion, if it existed, would be equivalent to a rule in favour of the state of things which must continue if action is not taken. A second class is that in which opinion is felt to be outgrowing a rule, so that a change in the law may be asserted in good conscience to be necessary, and yet, from the want of an international legislature, it is difficult to effect such change otherwise than by setting the example of it. And the third is that of an imperfect right, given by general opinion, although there is no international organ capable of defining the circumstances for its existence with the precision necessary for a rule. We have met with examples in the navigation of international rivers, extradition and the obsolescence of treaties; and it must be observed of this class that the complexity and variety of circumstances would often make it impossible, even if an international organ existed, that it should pronounce its judgment in the form of a rule. These three classes correspond to the cases arising in the internal affairs of a state in which the action of the legislature is required to supplement, to amend or to define

[1] See above, pp. 18, 153.

those rules of law which the judicature has to apply, or to give relief in particular cases where sufficient definition is impossible. Action in them by a state is political just as the action of a legislature is political. It stands towards international law, considered as a body of rules, that is as positive, very much as the action of parliament stands towards the law of the land. If the action is taken not by a single state but by a congress, the analogy is as close as it can be, having regard to the different conditions under which law exists among states having no common government. Till "the parliament of man" becomes a fact, states have to do for themselves what parliaments do for individuals. Of course in doing it a state or a congress is bound, like a legislature, to respect the principles of distributive justice; to be sure that all its action, if only on the fringe or borderland of law, is within the domain of right[1] (*droit*).

The cases in which the positive law of nations needs to be supplemented, amended or precisely defined, in order to bring it into conformity with justice or right, or in which justice or right direct that particular relief from the positive law should be allowed, appear to cover between them all the admissible political claims of states, as distinguished from their legal claims arising out of a positive *modus vivendi*. But the subject may be presented from different points of view, and, as exhibiting a view of it which we believe to be substantially the same as ours, we draw particular attention to the memoranda which were distributed by the Russian delegates to the members of the Hague conference in 1899, explanatory of Articles 5 and 10 of the Russian draft of a convention on international mediation and arbitration[2]. The distinction between the legal and political claims of states is there put forward as corresponding to the distinction between those which admit and those which do not admit of being made the subject of compulsory arbitration, that is, of treaties being concluded by which states should bind themselves to refer them to arbitration, while it is admitted that both are proper occasions for mediation. The contrast is represented as being one between conflicts of rights and of

[1] See above, pp. 9—11.

[2] Bluebook C. 9534, *Correspondence respecting the Peace Conference at the Hague in* 1899, pp. 39—45.

interests. The former conflicts are described as questions of a secondary order, and as having for their characteristic that a state claims from another a material indemnity for damage or loss caused to itself or its subjects by acts of the defendant state or its subjects which it judges not to be in accordance with law; and it is pointed out that questions of this class rarely cause war. The latter are described as touching the national honour of the state, or its superior or vital interests and its imprescriptible assets, and as having for their characteristic that a state claims from another that it shall exercise or abstain from exercising certain determinate attributes of sovereign power, that it shall do or not do certain determinate acts not touching material interests[1]; and it is pointed out that on such questions depend in a large part the security and prosperity of the state, and that only the sovereign power can be the judge of them. As examples of the former or legal class of claims and of arbitrations to which they have been referred are given "violation of the duties of neutrality (affairs of the General Armstrong, 1851, and of the Alabama, 1872), violation of the rights of neutral states (blockade of Portendik, 1843, &c.), unlawful arrest of a foreign subject (affairs of Captain White, 1864, of Dundonald, 1873, &c.), loss caused to a foreign subject by the fault of a state (Butterfield affair, 1888; conflict between Mexico and the United States, 1872; &c.), the seizure on *terra firma* of the private property of a belligerent (affair of the Macedonian), illegal seizure of ships (seizure of the Veloz, Victoria and Vigie, 1852; affair of the Phare, 1879; and others), violation of fishery rights (affair of the Newfoundland fisheries, 1877, &c.)." And it is added: "obviously in the exceptional cases in which the pecuniary interest at stake has an importance of the first order from the point of view of the interests of the state, for instance when the question is about the bankruptcy of a state, a power which appeals to its national honour or its vital interests will be able

[1] Particular material interests are intended, such as might occasion legal claims: general material interests are of course included in the prosperity of the state, which is said largely to depend on these questions. *Biens imprescriptibles* include moral as well as material possessions, in which sense the term "assets" has lately come into use: we employ it, but with an apology, since the term "possessions" has too material a sound.

to decline arbitration as the means of determining the conflict."

The questions arising from the obsolescence of treaties are classed by the memoranda among political ones. "The reciprocal rights and obligations of states," it is said, "are determined in a notable measure by the body of what are called political treaties, which are nothing else than the temporary expression of fortuitous and transitory relations between the different national forces. These treaties bind the freedom of action of the parties so long as the political conditions which produced them remain without change. When these change, the rights and obligations resulting from the treaties necessarily change also. It may be said generally that the conflicts which arise on political treaties turn in most cases not so much on a difference in the interpretation of what the treaty lays down as on the changes to be made in its provisions or on its complete abrogation. Consequently the powers which take an active part in the political life of Europe cannot submit conflicts arising on political treaties to a court of arbitration, in the eyes of which what is laid down by the treaty would be as binding and inviolable as what is laid down by the positive law is in the eyes of a national court of justice[1]."

Indeed the distinction which we are considering is generally made the basis of treaties by which states bind themselves to refer certain classes of differences to arbitration, or provide the machinery for international arbitration. In the Hague Convention for the Pacific Settlement of International Disputes, Art. 16, it is said that "in questions of a legal nature [*d'ordre juridique*], and especially in the interpretation or application of international conventions, arbitration is recognised by the signatory powers as the most effective and at the same time the most equitable means of settling disputes which diplomacy has failed to settle." Since that convention did not include an obligation to resort to arbitration, it could easily recommend a class of cases as suitable

[1] In an article on International Arbitration, in the *International Journal of Ethics* for October 1896 (vol. 7, pp. 1—20), reprinted as an appendix to this volume, we distinguished between legal and political differences between states, and pointed out the bearing of the distinction on their general suitableness for arbitration.

for that remedy without declaring them to be the sole class. But when an obligation is contemplated the usual course is to exclude the cases to which it is not to apply, and so not the legal but the political class of differences is brought into prominence. Thus in the Anglo-French treaty of 14 October 1903 the condition for submission to arbitration is expressed as being that the differences "do not involve either the vital interests or the independence or honour of the two contracting states, and that they do not affect the interests of a third power." And the plan of general arbitration which at the Pan-American congress of 1890 received the votes of sixteen of the nineteen American republics, including the United States, the three wanting being Chile, Uruguay and San Domingo, laid down that "the sole questions excepted are those which, in the judgment of any one of the nations involved in the controversy, may imperil its independence." Of course independence is such a vital interest and imprescriptible asset as the Russian memoranda mention, and on the other hand its notion brings in a reference to justice, by which we have pointed out that political claims transcending legal ones are constituted and limited. For the independence of a state is encroached on, not only when its separate existence is at stake, but whenever it is hindered in doing or not doing any thing that an independent state may justly do or abstain from doing. Thus the different points of view from which the distinction between legal and political claims has been presented in this section are in essential agreement.

That distinction is not *eo nomine* one of old standing in the theoretical treatment of international law. It has been brought into prominence under the nomenclature of legal or juridical and political by the discussions and negotiations on arbitration, which is essentially a juridical proceeding, although in the case of claims of the juridical class the practice by states of arbitration for their settlement is so old and frequent that their peculiarity could not fail to attract notice in one form or another. That there are grave practical difficulties in the way of extending beyond them any binding agreement to submit to arbitration is plain enough, as we have shown in the essay forming the appendix, but even a case of political difference

may sometimes happen in which states may reasonably, of their free determination, take that method of attaining the peace which is promised to men of good will. That however is rather a question of statesmanship than of the science of international law. It is enough here to urge that while that science, in accordance with the general opinion of the world as shown by the limitations in arbitration treaties, does not always preclude action on claims not given by positive law being taken on independent responsibility, such action ought always to be preceded by the most scrupulous examination of the justification for it.

The Alleged Inherent Rights of States.

The common classification of the rights of states has been into those which are inherent in them and therefore absolute, and those which arise to them from express or tacit convention and from contract. I will quote the language in which it is described by Rivier, one of the most accomplished jurists who have employed themselves on international law.

"These rights of self-preservation (*conservation*), respect, independence and mutual trade, which can all be carried back to a single right of self-preservation, are founded on the very notion of the state as a person of the law of nations. They form the general statute (*loi*) of the law (*droit*) of nations, and the common constitution of our political civilisation. The recognition of a state in the quality of a subject of the law of nations implies *ipso jure* the recognition of its legitimate possession of those rights. They are called the essential, or fundamental, primordial, absolute, permanent rights, in opposition to those arising from express or tacit conventions, which are sometimes described as hypothetical or conditional, relative, accidental rights. The authorities differ in referring to one or another of them the legal rights (*facultés*) which are their manifestations. Those differences are scarcely more than external; there is agreement at bottom. Every act which violates an essential right is a breach of the law of nations, an international crime or misdemeanour. The state injured has the right to demand reparation and satisfaction, and to compel the offending or responsible state to give it[1]."

Evidently the conditional or relative rights of this quotation are those comprising what we have described as the *modus vivendi* between states, from which legal claims spring, and the

[1] Rivier, *Principes du Droit des Gens*, t. 1, p. 257.

essential or absolute rights serve the purpose of the political claims of states, in justifying in certain cases action which the strict legal rules entering into the *modus vivendi* would not authorise or would even condemn. But it may be questioned whether rights so inherent in a state that they are founded on its very notion can properly be admitted.

Natural persons may have inherent rights, that is, rights to be ordinarily enjoyed within the definition given to them by the law of the land, but which are so sacred as in extreme cases to warrant revolutionary resistance if that law does not adequately recognise them. The right of association is one of them, but it is one over which the laws of all countries find it necessary to exercise a very real control, so much greater is the power of an association for evil than that of its individual members. But states are nothing more than associations of natural persons, acting too outside the salutary control of national law. Surely then the natural right of association is pushed to an intolerable extent when men are deemed to be empowered by it to give absolute rights to their creations in the international world; for instance, to give to a state an absolute right of self-preservation, in circumstances analogous to those which would justify a well ordered state in dissolving an association which had been erected within it. Surely also it is a logical error to assume, because states are moral persons and therefore capable of rights equally with natural individuals, that they must have the same rights as natural individuals.

Again, the doctrine of absolute rights threatens to lead to no practical result for states, as it would lead to none for men if there was not the law of the land over them to measure their rights in all ordinary cases. Wolff, to whom more than to any one else international law is indebted for that doctrine, taught that states have a right to those things by means of which they may avert their destruction and what tends to it, or without which they cannot perfect themselves or avoid what tends to their imperfection. But what two states deem that they require in order to avert their destruction or to promote their perfection may be incompatible, and then the doctrine gives only a clashing of equal rights. To meet this Wolff taught that every nation is free, and that by virtue of natural liberty every one must be allowed

to be the judge of his own actions, so that the right of a nation to what other nations naturally owe it is one which it must not enforce against the will of the latter. That view might receive support from what Thomasius had taught not long before, that the only duties which can be enforced consistently with justice are those which arise from the maxim "do not to others what you would not wish them to do to you," in other words, that negative duties alone belong to justice, affirmative ones being permanently relegated to the domain of morals[1]. But it would prohibit all political action by states, and while it is needless to say that it has not been carried out in practice, it must be added that most of those writers who admit absolute state rights have not even in theory adopted Wolff's negative conclusions, but have laboured to reconcile their doctrine with positive results by various unsatisfactory methods, one being that of a further plunge into the arbitrary in order to establish a hierarchical order of rights, indicating which must give way in the event of their clashing. That system reaches its climax when the right of self-preservation is made to swallow up all the others, as is done by Bonfils and Rivier. *Le droit de conservation*, the latter says, *est le premier des droits essentiels; il les résume tous.* And he goes on to quote from Bonfils: *en réalité il n'y a pour les états, personnes naturelles et nécessaires, qu'un seul droit primordial, un seul droit fondamental, le droit à l'existence*[2]. This, as well as the prominence given in practice to the plea of self-preservation as the warrant for political action, justifiable and unjustifiable, will oblige us to consider that alleged inherent right in some detail.

In the mean time a further observation must be made on the doctrine of inherent rights. Distributive justice, which is practically equivalent to the natural law of certain philosophical schools, is the only source from which rights other than legal ones can be derived either to individual men or to states[3]. In

[1] Wolff, *Jus gentium methodo scientifica pertractatum* (1749), §§ 32, 34, 37, 157, 158. As to Thomasius (1705) see Lorimer's *Institutes of International Law*, book 1, chap. XI.

[2] Rivier, u.s., quoting Bonfils 241.

[3] *Justitia expletrix* maintains men or states in the enjoyment of those legal rights (*facultates*) which belong to them under the distribution of

states which have attained the European standard and form of civilisation the nature of individual men is so fixed that certain decrees of justice about them may also be regarded as fixed, for instance, that which excludes slavery except as the punishment of crime. Hence there may be inherent rights, as that to personal freedom. But the nature of states has varied in historical times, and may again vary. The evolution of society proceeds much faster than the evolution of man. Hence inherent rights of states, could they be admitted, would have but a relative degree of fixity. And indeed we find that while the old writers on natural law contemplated their results as being applicable to all independent human groups, by the very fact of their having no common superior, the tendency now is to treat international law as being relative to what is called "the modern state." Perhaps however that state is not fixed enough to make it wise to endow it with inherent rights, instead of working out each problem which concerns it on its particular merits.

The Alleged Inherent Right of Self-Preservation.

The objections which we have urged against the general doctrine of the inherent rights of states must now be followed by an examination of the one of those rights which is recognised on all hands as being the most important, that of self-preservation. We will take the account of what we oppose from Rivier, *honoris causa*, and especially because of his authority in Roman law, the doctrine of which with regard to individuals has been made a foundation for what is asserted in the case of states.

"When," Rivier says, "a conflict arises between the right of self-preservation of a state and the duty of that state to respect the right of another, the right of self-preservation overrides the duty. *Primum vivere.* A man may be free to sacrifice himself. It is never permitted to a government to sacrifice the state of which the destinies are confided to it. The government is then authorised, and even in certain circumstances

such rights existing in the society of which they form part. Distributive justice (*attributrix*) regulates that distribution. Its province lies *de lege ferenda*, or, occasionally, in pointing out that in a particular case relief ought to be given from the operation of a legal rule which it would be inconvenient to modify generally.

bound, to violate the right of another country for the safety (*salut*) of its own. That is the excuse of necessity, an application of the reason of state. It is a legitimate excuse[1]."

We will here pause to remark that an argument which may be good as between a state and a government entrusted by it with its destinies is not necessarily good between it and that government together and another state; or we may put it that no state can entrust its government with wider powers than itself possesses. But Rivier adds:

"The excuse of necessity has always been allowed to private persons; *a fortiori* it will not be refused to states.—Ulpian, l. 29, § 3, *Ad legem Aquiliam*, 9, 2: *Item Labeo scribit si, cum vi ventorum navis impulsa esset in funes anchorarum alterius et nautæ funes præcidissent, si nullo alio modo nisi præcisis funibus explicare se potuit, nullam actionem dandam.* The same, l. 49, § 1, same title[2]."

In the case so put by Labeo there seems to have been an accidental physical entanglement of two ships which had to be ended in one way or another, but the cases in which the right of self-preservation is invoked to justify the political action of a state are those in which action clearly aggressive in its external character, and not demanded by any physical necessity, is asserted to fall in its intrinsic character within that right. There, whatever may have been the Roman law, British law does not permit a man to ward off danger from himself by transferring it to an innocent person. If he has preserved himself by action externally aggressive against another, he cannot justify his action as intrinsically defensive unless the person against whom it was directed was in fault towards him. Thus it has been held in England that, when a shipwrecked crew is in danger of starvation, it is not lawful for them to kill and eat one of their number, however pressing the necessity[3]. And it has been held in Scotland that a ship, in harbour during a gale and in want of

[1] *Principes du Droit des Gens*, t. 1, p. 277.

[2] *Ib.*, p. 278.

[3] *Queen* v. *Dudley and Stephens*, 14 Q.B.D. 273; decided unanimously by Lord Chief Justice Coleridge, Justices Grove and Denman, and Barons Pollock and Huddleston. Their lordships stated that they had Justice Stephen's authority for repudiating an inference in favour of the contrary opinion which had been drawn from some passages in his writings: p. 286.

searoom, may not cut the ropes of another ship and send her adrift even though it is her only means of escape, but must pay compensation[1]. Liability to suffer hurt, whether in person, in property or in rights, and whether by sentence of law or by private action which the law permits, presupposes a duty violated by the person who is to suffer it. When a small injury is inflicted in obedience to an almost irresistible impulse, the law may overlook it, but in principle we may not hurt another or infringe his rights, even for our self-preservation, when he has not failed in any duty towards us.

Self-preservation, when carried beyond this point, is a natural impulse, an effect of the laws to which human nature is subject in the stage of advancement to which it has yet attained. But the office of jural law is not to register and consecrate the effects of the laws of nature, but to control them by the introduction of the principle of justice, where an unreflecting submission to the tendencies which in their untamed state they promote would be destructive of society. In that way human nature itself has been gradually improved, and we may hope will continue to be so; but the contrast between, on the one hand, the generalisations which express whatever with regard to self-preservation may be its actual condition from time to time, and on the other hand the rules to be enforced by government on the same subject, furnish an instructive instance of the difference, too often overlooked, between the laws of nature, which are the generalised expression of what is, and jural laws, which lay down what is to be done[2]. In the case of a state the impulse or tendency which justice must control is not even that which arises spontaneously on the appearance of danger to natural life or individual welfare, but that which arises from the secondary attachment formed to human institutions. No doubt the state is of all human institutions that to which attachment is the most elevating to the emotions and the moral sentiments, especially when, as is the case of most states, its origin is so remote that the steps which have led up to it are forgotten, and it

[1] *Currie* v. *Allan*, 31 *Scottish Law Reporter* 814. See the article on that case in 6 *Juridical Review* 354—361, in which Mr W. Galbraith Miller criticises the common view of the Roman law.

[2] See above, p. 5.

wears the semblance of being a mould appointed by superior power for the feelings of its members to take shape from. Then those feelings, directed towards it, come nearest to pure altruism, having the smallest ingredient of satisfaction for ourselves or in our own work. But even then, although as a general rule we must admit the truth of Wolff's principle, that a state ought to preserve and perfect itself as an association of its citizens in order to promote their common good, patriotism should not allow us to forget that even our own good, and still less that of the world, does not always and imperatively require the maintenance of our state[1], still less its maintenance in its actual limits and with undiminished resources. The first interest of a society, national or international, is justice; and justice is violated when any state which has not failed in its duty is subjected to aggression intended for the preservation or perfection of another.

The True International Right of Self-Preservation.

What we take to be pointed out by justice as the true international right of self-preservation is merely that of self-defence. A state may defend itself, by preventive means if in its conscientious judgment necessary, against attack by another state, threat of attack, or preparations or other conduct from which an intention to attack may reasonably be apprehended. In so doing it will be acting in a manner intrinsically defensive even though externally aggressive. In attack we include all violation of the legal rights of itself or of its subjects, whether by the offending state or by its subjects without due repression

[1] Rivier gets a glimpse of this. *Un état peut-il perdre son droit à l'existence, en être déclaré déchu? C'est à quoi s'exposerait sans doute celui qui violerait d'une manière persistante les règles du droit des gens, qui agirait contrairement à toute bonne foi, à toute humanité; il se mettrait ainsi hors du droit des gens, hors la loi internationale.* Immediately however he seems to set up again the absolute right to existence, by asking *mais qui sera juge? Principes du Droit des Gens*, t. 1, p. 256. If such a case arose, as it may arise with regard to Turkey, the states called on by the circumstances to deal with it must in the present imperfect organisation of the world be the judges of their own political action, as the Great Powers were in 1815, when they justly determined to exclude Napoleon from the throne of France, whatever other government France might give herself.

by it, or ample compensation when the nature of the case admits compensation. And by due repression we intend such as will effectually prevent all but trifling injuries (*de minimis non curat lex*), even though the want of such repression may arise from the powerlessness of the government in question. The conscientious judgment of the state acting on the right thus allowed must necessarily stand in the place of authoritative sanction, so long as the present imperfect organisation of the world continues. If its legal rights or those of its subjects are concerned, and the necessity is not great and immediate, action on the right of self-preservation will seldom be conscientious unless arbitration has first been offered and refused; and there may be cases of a political kind not wholly unfitted for arbitration.

In illustration of this doctrine we will first refer to our section on *Self-Defence on the open sea in time of Peace*[1], in which some cases of preventive action on behalf of legal rights are discussed. Another illustrative case is that of the Caroline in 1838. A large body of Canadian insurgents and United States sympathisers had collected in the state of New York, where they obtained small arms and twelve guns by force from an arsenal, fired shots across the river Niagara into British territory, and were preparing to employ the steamer Caroline for their own crossing. Thereupon a British force boarded her while at her moorings on the New York side, and sent her adrift down the falls of Niagara. The United States complained of the violation of territory, and said that it lay on England "to show a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation...also that the local authorities of Canada, even supposing the necessity of the moment authorised them to enter the territories of the United States at all, did nothing unreasonable or excessive, since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it." This was good law, except as to the emergency's leaving no moment for deliberation, which seems to imply, but perhaps was not intended to imply, that the act was one which deliberation would condemn.

[1] Above, pp. 167—172.

Choice of means there was not, for the United States government, even had there been time for applying to it, had already shown itself powerless, and a regiment of militia was looking on at the moment without attempting to interfere with the raiders. The British government justified the acts of its authorities, at the same time recognising the formal inviolability of foreign territory by expressing its regret, and the incident was allowed to drop. As Hall points out, it was better for the United States themselves that the formal violation should occur, than that the lawlessness existing in their territory should be suffered to produce consequences for which they might have been held responsible[1].

Examples of the same character as the seizure of the Caroline have been given by the United States. In 1817 adventurers, acting in the name of the insurgent Spanish colonies of Buenos Ayres and Venezuela, established themselves on Amelia Island in Florida, then belonging to Spain but very near the boundary of Georgia, and in the language of Mr Adams, United States secretary of state, "assumed an attitude too pernicious to the peace and prosperity of this union and of its citizens to be tolerated." The Spanish authorities made "a

[1] In 1840 McLeod, a British subject, was arrested in the state of New York and tried for the share which he had taken in the destruction of the Caroline, but was acquitted on an *alibi*, the state courts having held that the adoption of his acts by the British government as acts of state was no defence before them. The federal government, on which a demand for McLeod's release had been made by Great Britain, agreed in repudiating that view of the law, and an act of congress (29 August 1842) was passed, giving jurisdiction of such cases to the federal courts. The question whether a foreigner is answerable to the local jurisdiction for acts done under the authority of his state, in the course of an invasion in time of war, would have been liable to too plain a negative to be raised; and since the authority of the state is the ground of the immunity there is no reason to distinguish, for this purpose, a violation in time of peace for self-defence from a warlike invasion. But in *The Commonwealth of Massachusetts* v. *Blodgett*, 12 Metcalf 56, Scott's *Cases on International Law* 308, it was decided that the order of a Rhode Island military officer, which the Governor of that state expressly refused to adopt, would not exempt the military inferior obeying it from the jurisdiction of the state of Massachusetts for the violation of its territory. The reasoning comprehended the case of two independent states, and appears to have been just.

feeble and ineffectual attempt to recover possession of the island," and the United States forces then occupied it by direction of President Monroe[1]. In 1818, Spain failing to restrain the Seminole Indians of Florida from incursions into the United States, the same president authorised General Jackson to occupy the Spanish post of St Mark's, in the heart of the Indian country, with orders to deliver it up to its rightful owners "on the arrival of a competent force to defend it against those savages and their associates[2]."

Perhaps the most memorable instance of political action on the ground of self-preservation, justifiable in our opinion, is that of the seizure of the Danish fleet by England in 1807. After the treaty of Tilsit there was good reason for believing that Napoleon and the czar Alexander, in order to obtain a great increase of naval power against England, intended to compel Denmark, by force if necessary, to join them in the war. The British government demanded of Denmark the surrender of her fleet, offering the most solemn pledge that on the conclusion of a general peace it should be restored in the same condition and state of equipment as when received. And on meeting with a refusal it caused the fleet to be captured by force of arms. Such a case is essentially similar to that of a belligerent having sure information that his enemy, in order to obtain a strategic advantage, is about to march an army across the territory of a neutral clearly too weak to resist, in which circumstances it would be impossible to deny him the right of anticipating the blow on the neutral territory. The principle that the legal rights of a state are not to be violated without its own fault is

[1] 1 Wharton's *Digest*, § 50 a.

[2] *Ib.*, § 50 b. In the same volume, § 50 e, will be found information relating to the raids of Mexican Indians and wandering Mexicans on United States territory, which the United States authorities were unable to suppress without pursuing the offenders across the frontier, passing for vast distances through wild country, which they claimed the right to do and to punish the offenders where found. Mexico does not seem to have seriously objected, and conventions for the reciprocal crossing of the frontier were concluded. The case was one of which the occurrence must be rare, and although punishment is something beyond defence, the principle would seem to warrant the injured party in inflicting it where the repetition of the offence cannot otherwise be prevented.

not really infringed, for when a state is unable of itself to prevent a hostile use being made of its territory or its resources, it ought to allow proper measures of self-protection to be taken by the state against which the hostile use is impending, or else must be deemed to intend that use as the necessary consequence of refusing the permission. It is a principle of jurisprudence that every one is presumed to intend the necessary consequences of his actions. We cannot therefore subscribe to the condemnation which many continental writers have pronounced on the conduct of England in 1807.

It is with relation to the particular topic of international law which we are now considering that the principle of policy which for centuries has been known and acted on as the balance of power must be discussed. That principle may be stated as requiring that every European state, either by its own strength or by that of a political system to which it belongs and on the assistance of the other members of which it can rely, shall be able to resist all attacks which any other state or system may make on it. As a corollary, any state or political system may be prevented, by war if necessary, from increasing its relative strength so much as to give it a decidedly preponderating strength in Europe. The justification of this principle, so far as it can have any, must lie in the expectation that any state or system will use such strength as it has in attacking its neighbours or encroaching on their rights. And it would be difficult to deny that there have been states as to the conduct of which such an expectation was well founded, so that other states were warranted in trying to reduce or limit the strength which they could command either in themselves or by their alliances, in order to secure their own safety by a balance of power. It is more doubtful whether international practice was ever so bad that the expectation of attack could reasonably be founded on the mere possession of strength by a neighbour, without specific grounds for inferring his intention, and certainly now such general and *a priori* suspicion would be baseless. Nothing therefore savouring of the principle of the balance of power ought now to remain, except such precautions as in particular cases may commend themselves to a cool head not easily alarmed. The natural growth of a nation in power, and

even the increase of its armaments in a fair proportion to its population and wealth and to the interests which it has to defend, must be looked on without jealousy, and without any attempt to check it, by those nations which by an inferiority of character or situation are destined to a decline in relative power. Growth by accession of territory presents a different question. The principle that any alteration of the map of Europe is a matter of legitimate interest even to the remotest member of the European state system, though no doubt the principle of the balance of power as a means of self-preservation had the chief share in its establishment, has, now at least, a force of its own, due to the general importance of justice in any assemblage of men or states which has the least pretension to be regarded as a society[1]. But it is only for the sake of justice that any right of interference with an accession of territory exists.

Intervention.

The term intervention is used in international law to express two very different cases of political action. One is the interference of a state in affairs pending between two or more other states, the other is the interference of a state in the internal affairs of another state. Little remains to be said on the former after the observations which we have made on the principle of the balance of power. When the relations between any two or more states have either passed into war or reached a degree of tension clearly threatening war, to deny the right of any other state to intervene in support of justice would be to deny the existence of an international society. When an analogous situation exists between individuals in a nation provided with a police, if the police are not present, as they cannot always be, it is both the right and the duty of bystanders to put an end to a brawl or to intercept a blow by which a brawl would be commenced. Still more must this be at least

[1] See above, p. 48. Of course every state in turn which exacts a cession of territory after a successful war, or seeks to profit by the marriage or inheritance of its monarchs, denies that a third power has any voice in the matter. But every state in turn claims a voice in such matters when it deems it to its interest to do so.

a right among states not provided with a police, but having commercial and other interests unavoidably affected by a war in any part of the world, while it commonly happens that several of them have also separate interests connected with the quarrel or with the way in which it may be settled. In such circumstances the motive for intervention is always present in more or less strength, and the general judgment of history has never condemned statesmen for acting on it, when it has been adequate to compensate the damage and risk attendant on widening the area of an international quarrel, and when the action taken on it has been consonant with justice.

Intervention in the internal affairs of another state is justifiable in two classes of cases. The first is when the object is to put down a government which attacks the peace, external or internal, of foreign countries, or of which the conduct or avowed policy amounts to a standing threat of such an attack. The second is when a country has fallen into such a condition of anarchy or misrule as unavoidably to disturb the peace, external or internal, of its neighbours, whatever the conduct or policy of its government may be in that respect.

Of the first class no better example can be given than the decision of the great powers in 1815 to exclude Napoleon from the throne of France, as a man the experience of whose conduct precluded belief in any protestations of peacefulness which he might make. With this must be strongly contrasted the attempt which during a few years after the congress of Vienna was made by the continental great powers to rule Europe on the principle of legitimacy. In the circular despatch which, on the occasion of the insurrection at Naples, the courts of Austria, Russia and Prussia dated from Troppau, 8 December 1820, they said that "the powers have exercised an incontestable right in occupying themselves with taking in common measures of security against states in which the overthrow of the government by a revolt, even could it be considered only as a dangerous example, must have for its consequence a hostile attitude against all constitutions and legitimate governments." This was to assert a right of self-preservation against the contagion of revolution; to deny to a nation the right of establishing for itself free institutions, by force if they cannot otherwise be

attained, lest the example should be dangerous to autocratic governments in other countries. The true principle was expressed by Canning, when on 31 March 1823, on the occasion of the French intervention against the government which had been established by insurrection in Spain, he wrote to the British ambassador at Paris: "No proof was produced to his majesty's plenipotentiary of the existence of any design on the part of the Spanish government to invade the territory of France, of any attempt to introduce disaffection among her soldiery, or of any project to undermine her political institutions; and so long as the troubles and disturbances of Spain should be confined within the circle of her own territory, they could not be admitted by the British government to afford any plea for foreign interference. If the end of the last and the beginning of the present century saw all Europe combined against France, it was not on account of the internal changes which France thought necessary for her own political and civil reformation, but because she attempted to propagate first her principles, and afterwards her dominion, by the sword[1]." The system of the Holy Alliance treated the international society as one for the mutual insurance of established governments, and it was not until its defeat that "the modern state" of which so much is heard on the continent, and of which one essential characteristic is the distinction between a state and its government, fully emerged as the subject of international law[2].

In considering anarchy and misrule as a ground for intervention the view must not be confined to the physical consequences which they may have beyond the limits of the territory in which they rage. Those are often serious enough, such as the frontier raids in which anarchy often boils over, or the piracy that may arise in seas in which an enfeebled government can no longer maintain the rule of law[3]. The moral effect

[1] We quote the last sentence only for the principle, without implying anything as to the historical accuracy of the judgment passed by Canning on the wars of the French revolution, further than that it was certainly a true judgment so far as concerns the part taken in those wars by Great Britain.

[2] See above, p. 58.

[3] The piracy which acquired new vigour in the Levant during the long and devastating struggle for the independence of Greece was one of the justifications which Great Britain, France and Russia had for intervening.

on the neighbouring populations is to be taken into the account. Where these include considerable numbers allied by religion, language or race to the populations suffering from misrule, to restrain the former from giving support to the latter in violation of the legal rights of the misruled state may be a task beyond the power of their government, or requiring it to resort to modes of constraint irksome to its subjects, and not necessary for their good order if they were not excited by the spectacle of miseries which they must feel acutely. It is idle to argue in such a case that the duty of the neighbouring peoples is to look on quietly. Laws are made for men and not for creatures of the imagination, and they must not create or tolerate for them situations which are beyond the endurance, we will not say of average human nature, since laws may fairly expect to raise the standard by their operation, but of the best human nature that at the time and place they can hope to meet with. It would be outside our scope to pass judgment on present or recent cases, but it is by these principles that we must try such interventions as have taken place in Turkey, or as that of the United States in Cuba.

Let us now suppose that a state has intervened in the internal affairs of another, whether with sufficient justification or not: does that fact give to third states a right of intervention in the same affairs, on a principle sometimes advanced as that of intervention against intervention? We must say that the affairs in question have ceased to be purely internal from the moment of the first intervention, even if it was the body internationally recognised as the government which called in the foreign aid. The physical forces of two states are *de facto* concerned in them, and they have passed beyond determination by national power, in favour of which alone foreign power is called on to stand aloof. Third states may therefore step in, in support of justice or of their interests so far as consonant with justice.

It only remains to observe that the tender of advice to a foreign government, even about the internal affairs of its state. is not intervention and violates no right, though it is generally injudicious. Statesmen must remember that though governments and states are different, and it is to states that the rights

given by international law belong, yet it is governments that they have to live with and whose susceptibilities they will therefore find it needful to consult.

The Equality and Independence of States: the Great Powers.

The rights of equality and independence are often reckoned among the inherent rights of states. With regard to the first, semi-sovereign or dependent states are manifestly unequal to sovereign or independent ones, and even the latter are ranked for ceremonial matters in an order of precedence, while it is not pretended that they are or ought to be equal to one another in the influence which accompanies strength. Their equality consists in the fact that in the received principles and rules of international law, other than those of a ceremonial nature, no distinction is made between great states and small, so that the influence of strength is only lawful when exerted in modes which the right of self-defence does not authorise those on which it is exerted to resist. Thus considered, and there is really no other way of considering it, the equality of sovereign states is merely their independence under a different name.

We are here irresistibly reminded of the existence in Europe of the great powers as a separate and recognised class, and are led to ask whether it can be reconciled with the equality and independence which international law deems to belong to the smaller powers. There is no doubt that several times during the nineteenth century the great powers have by agreement among themselves made arrangements affecting the smaller powers without consulting them, and with the full intention that those arrangements should be carried into effect, although it has not been necessary to resort to force for that purpose because the hopelessness of resistance in those circumstances has led to an express or tacit, but peaceable, acceptance of the decrees by the states concerned. Lord Salisbury described the great powers as being, by virtue of the position thus assumed by them, the legislature of Europe. In a debate in the House of Lords on the Cretan question and the attitude of Greece and of certain British politicians with regard to it, 19 March 1897, he said:

"I do not take the integrity of the Ottoman empire for a permanent dogma. It was established by the legislature of Europe; it was established, it has been modified by them; no doubt it will be modified again....But what is done will be done by the consent of all the powers by which the integrity of Turkey was made part of European law. Much was said, not I think by the noble lord [Lord Kimberley] but by those who stood by him, in condemnation of the powers of Europe on this occasion. At least it may be said for them that they are representing a continuity of policy, and that they are maintaining the law of Europe as it has been laid down by the only authority competent to create law for Europe. They have been defied by a state which owes its very existence to the concert of Europe. If it had not been for the concert of Europe the Hellenic kingdom would never have been heard of....I feel it is our duty to sustain the federated action of Europe. I think it has suffered by the somewhat absurd name which has been given to it—the concert of Europe—and the intense importance of the fact has been buried under the bad jokes to which the word has given rise. But the federated action of Europe—if we can maintain it, if we can maintain this legislature—is our sole hope of escaping from the constant terror and the calamity of war, the constant pressure of the burdens of an armed peace which weigh down the spirits and darken the prospects of every nation in this part of the world....The engagements into which it enters must be respected....They must not be thrown over at the mere will of an outside power[1]."

It would be impossible to put better the argument in favour of the position assumed by the great powers, and if each of their proceedings be considered separately, the ratification subsequently conceded to it by the states affected saves it from being a substantial breach of their equality and independence, leaving it open only to the charge of a want of courtesy in manner. It stands as an example of political action, not to be condemned if just. But when such proceedings are habitual they present another character. They then carry the connotation of right which by virtue of human nature accretes to settled custom, and the acquiescence of the smaller powers in them loses the last semblance of independent ratification. We are in presence of the first stages of a process which in the course of ages may lead to organised government among states, as the indispensable condition of their peace, just as organised national government

[1] *Times* of 20 March 1897. The bad jokers to whom Lord Salisbury referred should remember that, since we habitually speak of "concerted action," music has no claim to monopolise the meaning of "concert."

has been the indispensable condition of peace between private individuals. The world in which the largest intercourse of civilised men has been from time to time carried on has not always been distributed into equal and independent states, and we are reminded by what we see that it may not always continue to be so distributed.

In the mean time the notion of sovereignty or independence has become the object of an extreme, possibly exaggerated, respect, which in speaking of the political action of states it is important to notice. The conclusion of a treaty by which a state should restrict its action, with a due consideration of the benefits to be gained thereby and stopping short of reducing itself to a condition of semi-sovereignty, would probably be regarded by few or none in England in any other light than as an exercise of its sovereignty. Elsewhere however it is often regarded as being *pro tanto* a renunciation of its sovereignty, as though the honour and almost the independence of a state depended on its preserving the utmost possible freedom to act on every occasion, unfettered even by obligations of its own creation. This feeling, although we may deem it jealous or punctilious, often has to be reckoned with. It was conspicuously exhibited in the opposition which Great Britain has met with at various times in her efforts to introduce, by conventions with other powers, a reciprocal right of visit for the suppression of the slave trade. And a notable instance of it has recently come under our observation in the remarks which have been made on the International Sugar Union of 1902. *Dérogeant aux idées jusqu'ici admises en matière de souveraineté, la Convention de Bruxelles a créé au-dessus des états contractants une véritable autorité internationale investie de pouvoirs propres.* It is remarked that the international unions previously existing for administrative purposes, with their head quarters at Bern or Brussels, have no functions but such as are simply consultative or ancillary to carrying out decisions. *Toutes les fois qu'il est nécessaire de prendre une décision, c'est aux états intéressés ou à leurs représentants réunis en conférence qu'il appartient de statuer. Et en règle générale pour être obligatoire cette décision doit, conformément aux usages diplomatiques, être prise à l'unanimité des voix.* But among the functions of the Sugar Union *il en est qui*

comportent des décisions exécutoires sans appel. Il en est qui peuvent aboutir à des décisions définitives ou souveraines[1].

This is the language of an able writer, not unfriendly to the Sugar Union, but pointing out, as a new and interesting step in the organisation of the international society, a peculiarity which in England was certainly not noticed as an international novelty, whatever consideration was given to its expediency.

The Monroe doctrine proclaimed by the United States has often been cited as a parallel to the position asserted for themselves by the great powers in Europe, and the two are indeed alike in being claims to regulate, more or less, the affairs of a quarter of the globe. But their relations to international law are different. The Monroe doctrine has not been systematically carried out by enforcing on the other American states arrangements in which they were not consulted, and there are signs that those states would not allow it to be so carried out. Consequently it must stand, at least for the present, as a policy which the United States are entitled to entertain so far as its application may in each instance be just, precisely as Great Britain and Russia have their policies for Central Asia; and it would be beside the scope of the present volume to examine its origin and development.

NOTE.

Some facts relating to the growth of the authority of the great powers may usefully be given, as illustrating what is fast becoming a part of international law. Our *Chapters on the Principles of International Law*, pp. 92—101, may be referred to.

At the congress of Vienna in 1814—15 "the committee of the five great powers"—Austria, France, Great Britain, Prussia and Russia—was formally constituted; and meetings of eight powers, being the five together with Portugal, Spain and Sweden, which had been parties to the alliance against France, were recognised. The final act was prepared for signature by the eight, but was not signed by Spain, which among the reasons for refusing mentioned the facts that the plenipotentiaries of the five "had no power to determine the destiny of Tuscany and Parma without the concurrence of the Spanish plenipotentiary, and that the act included

[1] N. Politis, *L'Organisation de l'Union Internationale des Sucres*, in the *Revue de Science et de Législation Financières* for January, February, March 1904.

many articles which had not been reported at the meetings of the plenipotentiaries of the eight powers."

In the war of 1815 the smaller powers took part, and claimed, but were refused, admission to the conferences for settling the terms of peace. The territories renounced by France and the pecuniary indemnity to be paid by her were placed by the treaty of 20 November at the disposal of the four great allies, who had determined their distribution by protocols of 3 and 6 November; and the other states submissively took the shares of territory and money thus assigned to them.

At the congress of Berlin in 1878, Italy now ranking as a great power, Servia and Rumania were raised to independence, and the independence of Montenegro, already recognised by the other great powers, was recognised by Great Britain and Turkey. The boundaries of Servia and Montenegro were enlarged and an exchange of territory was decreed for Rumania, and it was provided that in all three religion should be free and should not be a cause of incapacity. At the same time Turkey was recommended to enlarge the territory of Greece at her expense. Yet neither Rumania, Servia, Montenegro nor Greece was a party to the congress or to the treaty of Berlin, nor was Greece a party to the convention of 24 May 1881, by which the six great powers fixed with Turkey the limits of the enlargement which she was to receive; and although what was treated as an acceptance of her new limits had been obtained from Greece, it was not recited in the convention.

The position of Turkey is ambiguous. It is clear that the six, when they are agreed among themselves, treat her as a state on which their will is to be enforced: hence, since the great powers do not decide by the vote of a majority, it follows that at least in case of difference with her Turkey is not dealt with as a great power. But when she had arrived at an agreement with the six on the limits of the enlargement to be given to Greece—and not by way of simple acquiescence, such as was shown by the small states in 1815, for she obtained the exclusion of Epirus from the cession recommended to her at Berlin—she ranked as a seventh great power in imposing on Greece the terms so settled, as was practically done by the convention of 1881.

CHAPTER XIV.

THE PROTECTION OF SUBJECTS ABROAD.

General Principles.

In speaking of national jurisdiction we have seen to how large an extent the persons and the rights and property of foreigners are left to it, provided that it be exercised with integrity and impartiality and that there be no flagrant injustice in its methods or in the law enforced by it. The like conditions underlie the subjection of foreigners to the administrative action of the territorial government. If they are wanting either to the judicial or to the administrative department, the state to which a foreigner belongs has a claim to step in for his protection which often has this in common with political claims, that the justice which the foreign power demands for its subject is not measurable by definite rules. Often on the other hand the subject complains of the breach of a definite rule included in the *modus vivendi* of nations, and even where it is otherwise whatever pertains to justice in the case of an individual is nearly allied to the science of law, depending largely as it does on the general notions on which the peoples of European civilisation are agreed that legal and administrative procedure ought to be based. Consequently claims which are made in order to obtain redress or satisfaction for wrongs alleged to have been done to individuals, and which are not based on public rights, must as a whole be ranked with legal claims. Constituting as they do exceptions to the general rule of submission to the territorial jurisdiction or administration, they are perhaps of all parts of international law that on which it is most difficult

to say anything precise, and are peculiarly fitted for arbitration.

"Justice," Vattel says, "is denied, 1st, by refusing to hear your complaints or those of your subjects, or to admit the latter to establish their right before the ordinary courts; 2nd, by interposing delays for which no good reasons can be given, and which are equivalent to a denial or still more ruinous; 3rd, by a manifestly unjust or partial judgment. But the injustice must be very evident and palpable[1]."

On this we may say that it must be evident and palpable to the general conscience of the peoples of European civilisation, and not turn on the absence of some security to an accused person or a litigant which does not enter into the common law of those peoples, such as trial by jury or an equivalent to an English *habeas corpus*. Mr Evarts, secretary of state of the United States, wrote on 8 December 1877:

"It has from the very foundation of this government been its aim that its citizens abroad should be assured of the guarantees of law; that accused persons should be apprised of the specific offence with which they might be charged; that they should be confronted with the witnesses against them; that they should have the right to be heard in their own defence, either by themselves or such counsel as they might choose to employ to represent them; in short that they should have a fair and impartial trial, with the presumption of innocence surrounding them as a shield at all stages of the proceedings, until their guilt should be established by competent and sufficient evidence[2]."

To this may be added, from a despatch of Mr Blaine, 2 June 1881, "that an accused person shall be afforded an opportunity for a speedy trial[3]"; and from one of Mr Fish, 27 December 1875, that the trial "must be conducted without unseemly haste[4]." Unjust discrimination is repeatedly found among the complaints made in United States despatches; as an example we may mention that a law, by which the estate of a person dying in the country was to be confiscated unless the heirs appeared and claimed it, met with an urgent remonstrance

[1] *Droit des Gens*, l. 2, ch. 18, § 350.

[2] 2 Wharton's *Digest*, 623.

[3] *Ib.* 627.

[4] *Ib.* 620. This despatch was written on the occasion of the affair of the Virginius (see above, p. 167).

from Mr Evarts, 4 September 1879, as an unjust discrimination against citizens of the United States[1]. And Mr Bayard wrote, 21 May 1885, with reference to a debtor's power of obtaining his release by making an assignment of his property for the benefit of his creditors, that "to close to an alien litigant some given channel of recourse open to a native, without leaving open some equivalent recourse, is a denial of justice[2]."

When there has been a denial or failure of justice the state in which it has taken place stands as a unit to bear the responsibility of it. It cannot excuse itself by laying the fault on the judges or on a jury, however independent of the executive its constitution makes them, or on the legislature, however defective its laws may be, or on the authorities of a province which its constitution gives the central power no means of controlling while it prevents foreign states from having recourse to those authorities. In 1891 a mob at New Orleans, "as it would appear without any protest from state [Louisiana] or city governments[3]," broke open the jail and shot or hung many persons, several Italian subjects among them, who were suspected of the murder of the chief of the city police and of tampering with the jury which had acquitted them. The president expressed regret for the occurrence, and declared his purpose to recommend congress to grant an indemnity to the families of the victims, but the Italian government, quite rightly, demanded the prosecution and punishment of the leaders of the mob. This the president was unable to obtain, from the feeling in Louisiana and the want of power in the federal courts; and the Italian government withdrew the demand for punishment and accepted a money indemnity instead.

The grounds on which money compensation to the families of the murdered Italians, and satisfaction to their government for the outrage by the punishment of the criminals, were due in the instance just cited were that good will and due diligence on the part of the local authorities would have prevented the

[1] 2 Wharton's *Digest*, 625. The frequency of their citizens' dealings with the West Indies and Spanish America is the cause of the United States despatches abounding on the subject of their protection.

[2] *Ib.* 643: Van Bokkelen's case.

[3] Thus the summary in Scott's *Cases on International Law*, p. 328.

occurrence, and that the necessary power in the federal courts would have ensured its punishment. But such grounds are often wanting when foreigners suffer in the course of disturbances beyond mere riots. During an insurrection the best will on the part of the state government, backed by the best laws, is often unable to prevent or to punish regrettable occurrences. In those circumstances it is not usual for a state to indemnify its own subjects, and foreigners can have no better claim than nationals in a matter not generally recognised as one for indemnity; while the maxim *nemo tenetur ad impossibilia* negatives any responsibility of the regular government for an indignity which the insurgents may have offered it out of the reach of its forces. Foreigners must even be content to submit, in common with nationals but not by way of discrimination from them, to those measures beyond the ordinary course of law or administration which the government may find it necessary to adopt for the suppression of the insurrection, so long as they do not conflict with humanity or with substantial justice. Every state in turn resorts to such measures when the necessity for them arises, and covers them *ex post facto* by an act of indemnity if they are not provided for in advance by exceptional laws for extraordinary occasions. During the American civil war president Lincoln suspended the writ of *habeas corpus*, claiming constitutional authority to do so under the so-called war power, which the Supreme Court, of course ineffectually, denied him. Earl Russell complained on behalf of British subjects, but ultimately and rightly acquiesced. The measures for putting down insurrection might be frustrated if governments had any other duty towards foreigners than to see that they are applied to them on an equality with nationals, without undue harshness, and with reasonable grounds in the case of each person. If, while governments observe these conditions, they are in conflict with and overrule any other authority of their state, as Lincoln did the Supreme Court, their position at the worst is that of having possessed themselves of power by a *coup d'état*, and international recognition is not denied to those who strike successful *coups d'état*.

Contractual claims.

Coming now to a more particular consideration of the protection of subjects in respect of the contractual claims which they may have in foreign countries, we may first notice that the United States have been led, by the great extent to which their citizens have engaged in enterprises in countries where the security of civil rights has not been of the highest order, to adopt a very cautious policy. Mr Seward, secretary of state, wrote on 27 April 1866: "The people who go to these regions [South America] and encounter great risks in the hope of great rewards must be regarded as taking all the circumstances into consideration, and cannot with reason ask their government to complain that they stand on a common footing with native subjects in respect to the alleged want of an able, prompt and conscientious judiciary. We cannot undertake to supervise the arrangements of the whole world for litigation, because American citizens voluntarily expose themselves to be concerned in their deficiencies[1]." This language points to a sparing exercise of the common right of interfering in case of a denial of justice, and we believe that such has been the practice of the United States where there has been no unjust discrimination against their citizens.

In the case of contracts between their citizens and foreign governments the United States appear to go still further. Mr Fish, secretary of state, wrote with reference to such cases on 27 June 1870: "The department has usually limited its interposition to authorising the proper diplomatic agent of the government abroad to use his personal good offices toward obtaining relief for the claimant. The reason for this policy is that claims based on contract are supposed to stand upon a very different footing from those which arise from injuries to person and property committed by the authorities of any foreign government[2]." But this is not made an absolute rule. Mr Frelinghuysen, secretary of state, wrote on 17 January 1884: "There are also cases, but not common enough to form

[1] 2 Wharton's *Digest*, 655.

[2] *Ib.* 656.

a rule of action, where, the bonds of one government being wholly or largely held by the citizens of another, upon default thereof the government of which the creditors are citizens may endeavour by diplomatic remonstrance or negotiation to effect an international agreement between the two countries, prescribing time and manner of adjustment[1]." And Mr Cass, secretary of state, in a despatch of 25 July 1858, promised interposition on behalf of citizens whose contracts with foreign authorities should be declared forfeited, "unless there has been a fair and impartial investigation in such a manner as to satisfy the United States that the proceeding has been just[2]." Possibly a distinction may here be intended between enforcing a contract and allowing it to be declared forfeit.

It appears to us that contracts with foreign governments ought not to be treated as forming a single class. We will repeat on that point language of which ten years' experience and reflection have confirmed to us the justice. "A distinction seems to exist between the case of bonds forming part of a public loan on the one hand, and contracts such as those for concessions or the execution of works on the other hand. Interests of the latter kind usually enjoy regular protection by law, notwithstanding that a government is the defendant against whom relief is to be sought. There is a petition of right, a court of claims, or an appropriate administrative tribunal before which to go. The case is not essentially different from any other arising between man and man. The foreigner who has contracted with the government has not elected to place himself at its mercy, and the rule of equal treatment with nationals requires that he shall have the full benefit of the established procedure, while if in a rare instance there is no such established procedure, or it proves to be a mockery, the other rule of protecting subjects against a flagrant denial of justice also comes in. But public loans are contracted by acts of a legislative nature, and when their terms are afterwards modified to the

[1] 2 Wharton's *Digest*, 663. And see Mr Evarts, 31 Oct. 1877, admitting "an exception to the general rule" where the government in question does not hold itself amenable to judicial suit by foreign claimants on contracts made by it.

[2] *Ib.* 661.

disadvantage of the bondholders this is done by other acts of a legislative nature, which are not questionable by any proceeding in the country. If therefore the rule of equal treatment with nationals be looked to, the foreign bondholder has no case unless he is discriminated against. And if the rule of protecting subjects against a flagrant denial of justice be looked to, the reduction of interest or capital is always put on the ground of the inability of the country to pay more—a foreign government is scarcely able to determine whether or how far that plea is true—supposing it to be true, the provisions which all legislations contain for the relief of insolvent debtors prove that honest inability to pay is regarded as a title to consideration—and the holder of a bond enforceable only through the intervention of his government is trying, when he seeks that intervention, to exercise a different right from that of a person whose complaint is the gross defect of a remedial process which by general understanding ought to exist and be effective[1]." Hence we think that the assistance of their state ought not to be granted to the bondholders of public loans, unless the defaulting government presumes to treat its internal and external debts on terms of inequality unfavourable to the latter. But we see no reason for not granting, on other contracts with foreign governments, the same assistance which, on the general principles relating to the protection of subjects, is due to them when suffering the denial or failure of justice on their contracts with private persons.

Hall however sees no difference in principle between what may be called the private contracts and the public loans of a government, though he admits a difference in practice relating to them. And both Lord Palmerston and Lord Salisbury maintained the view that the right of intervention on behalf of bondholders is unquestionable, although its exercise ought to depend on the balance of considerations, the amount of loss in the particular instance being weighed against the general expediency of discountenancing hazardous loans. Continental

[1] *Chapters on the Principles of International Law*, p. 107, with some verbal alterations.

writers uphold such intervention as an important exercise of the right of self-preservation applied to the national fortune[1].

It remains to notice a special and we think wise rule of the United States. "By adopting a foreigner under any form of naturalisation as a citizen, this government does not undertake the patronage of a claim which he may have upon the country of his original allegiance or upon any other government. To admit that he can charge it with this burden would allow him to call upon a dozen governments in succession, to each of which he might transfer his allegiance, to urge his claim. Under such a rule the government supposed to be indebted could never know when the discussion of a claim would cease[2]."

[1] Rivier says: *La fortune des particuliers, sujets de l'État, forme un élément de la richesse et de la prospérité de l'État même. Il a intérêt au maintien, à l'accroissement de cette fortune. Si donc elle est compromise par le fait d'un État étranger qui administre mal ses finances, qui trahit la confiance que les particuliers ont eu en lui lorsqu'ils ont souscrit à ses emprunts à des conditions qui ne sont pas observées, qui viole ses engagements à leur égard, l'État auquel appartiennent les particuliers lésés est évidemment autorisé à prendre leurs intérêts en main de la manière qu'il jugera convenable.* T.I. p. 272; under the general head of *le droit de conservation.*

[2] Mr Fish, 16 May 1871. 2 Wharton's *Digest*, p. 656.

CHAPTER XV.

INTEROCEANIC SHIP CANALS.

The arrangements as to the Suez canal, and as to the intended "ship canal to connect the Atlantic and Pacific oceans by whatever route may be considered expedient[1]," belong to international law not merely in the loose sense in which a knowledge of that law includes a knowledge of the principal contractual arrangements existing among states. Those canals are or will be of strategical and commercial importance so great that they could not be left simply as internal waters of the states through the territories of which they pass, nor on the other hand did the general interest allow of their being treated on the same footing as natural straits. A system therefore had to be elaborated in the case of the Suez canal, as the first, by the joint influence of facts and of negotiation; and now that that system has been applied to the intended American canal by the Hay-Pauncefote treaty between the two great North American powers, Great Britain and the United States, it must be considered as the *modus vivendi* established for a class of cases, though a restricted one, and therefore as belonging to international law in the narrower sense as much as any other rule of that science in establishing which the concrete as well as the abstract has had to be taken into account. Some detail on the process of its elaboration may be excused as an illustration of the growth of international law.

[1] The description in the preamble to the Hay-Pauncefote treaty of 18 November 1901.

The Pharaohs and Ptolemies contemplated a canal from the Nile to the Red Sea, but the first recorded suggestion of a canal across the isthmus was made to Mehemet Ali in 1836, by two French engineers, old Saint Simonians. The pasha asked the advice of Prince Metternich, who postponed giving it till the plans should be reported practicable by the engineers consulted on behalf of Egypt; and when this was done in 1838 he advised that the canal should be undertaken but neutralised by a European treaty, probably not attaching the strict meaning of neutrality to the term. The project however remained for a time in suspense, owing to the troubles which arose from the overweening ambition of Mehemet; and when, at the conclusion of those troubles in 1841, the closure of the Bosphorus and Dardanelles to ships of war while the sultan is at peace was embodied in the convention of London between the great powers, Metternich pointed out that convention to Mehemet as a precedent[1]. The first concession was made by Saïd Pasha on 30 November 1854 to M. Ferdinand de Lesseps, who in pursuance of it formed a company with statutes dated 5 January 1856, fixing its seat (*siége social*) at Alexandria but its administrative, legal and jurisdictional domicile at Paris, and adopting for its regulation the principles applicable to French *sociétés anonymes* (arts. 3 and 73)[2]. A second concession of the last mentioned date recognised the company, and declared (art. 14), subject to the sultan's ratification which was necessary for both concessions, "that the canal and the ports dependent on it shall be for ever open, as neutral passages, to all merchant ships crossing from one sea to the other, without any distinction, exclusion or preference of persons or nationalities, on payment of the dues and observance of the regulations established by the company." But nothing was said about ships of war.

[1] Sir Travers Twiss, in 7 *R. de D.I. et de L.C.* 682, and in the *Annuaire de l'Institut de Droit International*, 1879/80, pp. 114, 119.

[2] The effect of this is to make the nationality of the company Egyptian, while transferring to France and French law the consequences as to the internal management which would generally result from the nationality of a company. See the *Concessions, Conventions, Statutes and Resolutions of the Suez Canal Company, with the Sultan's Firman*: Parliamentary Papers, Egypt, no. 6 (1876); c. 1416.

Two difficulties retarded the ratification of the concessions by the sultan, who in a matter of such worldwide importance could not well act without the approval of the powers. One was that the concessions included not only the land required for the canal and a freshwater communication which the company was empowered to make between it and the Nile, but also all the public land which should be irrigated and brought into cultivation by the company, subject after ten years to the same taxes as similar lands, an immense grant which was left indefinite by the maps referred to in the concessions not having been really made. The objection raised to this establishment of a practically French company as lord of the soil in the heart of Egypt was ultimately met by the company's abandoning to the pasha its right to the freshwater canal and the land grant in connection with it, in consideration of indemnities of ten million francs for the former and thirty million for the latter. The other difficulty was Lord Palmerston's desire that the canal should not be large and deep enough to admit line-of-battle ships, to which the Porte on 1 August 1863 directed the pasha of Egypt to give effect, but to do so was found to be impracticable because the size of merchant ships had increased so greatly that to admit them and exclude line-of-battle ships was no longer possible, and the point was tacitly dropped. The final terms were embodied in a contract of 22 February 1866 between the pasha and the company, by art. 10 of which the Egyptian government reserved the right of "occupying every position or strategical point which it should deem necessary for the defence of the country, such occupation not to obstruct the navigation and to respect the servitudes attached to the banks of the canal." This contract was confirmed by the sultan's firman of 19 March 1866, and the canal was opened on 17 November 1869.

Thus when the Franco-German war broke out in 1870 the Suez canal was territorial water, subject to no other modification of the usual rights in such water than an engagement not to exclude merchant ships or obstruct their passage on any ground. The passing of belligerent ships of war through the canal would therefore be legally a breach of the neutrality of the Turkish empire, and whichever party to the war was not the first to pass through might complain of the other's doing so, reserving

equal liberty for himself till the strict law should be applied to both. Nevertheless the ships of war of both belligerents used the canal without any complaint being made. And disputes having arisen about the company's tariff, an international commission assembled at Constantinople drew up, under date 18 December 1873 and with the signatures of the delegates of all the maritime powers of Europe except Portugal, which abstained for other reasons, a scale of dues in which those payable for ships of war and transports were inserted without any exception of belligerents. But those incidents, important as they were, could not be considered as sufficient to settle the question, and in the beginning of 1877 the shareholders of the company were naturally anxious at the evident approach of war between Turkey and Russia, which would raise the question in the acute form resulting from the territorial power being one of the belligerents. By that time the British government had become one of the largest shareholders, and inspired by that interest, by its duty as a great power to consider the general welfare, and by the peculiar importance to it of the canal as furnishing the shortest route to India, it took action which was clearly political as distinguished from legal and was universally approved.

The company's bulletin of 12 February 1877 published the following communication made by the British government to the general meeting of shareholders. "An attempt to blockade or otherwise interfere with the canal or its approaches would be regarded by H.M.'s government as a menace to India and a grave injury to the commerce of the world. On both these grounds any such step, which they hope and believe there is no intention on the part of either belligerent to take, would be incompatible with the maintenance by them of an attitude of passive neutrality." An attempt by the British government to unite that of France with its action led to no result, but the former having made to the Russian ambassador (May 6) a communication similar to that made to the company, Prince Gortchakow replied (May $\frac{18}{30}$) that "the imperial cabinet will neither blockade nor interrupt, nor in any way menace, the navigation of the Suez canal. They consider the canal as an international work, in which the commerce of the world is interested, and which should be kept free from any attack."

On May 4 Lord Derby made known in the House of Lords a determination to maintain the free passage of the canal for British ships of war, whereupon M. de Lesseps proposed to him to seek an international agreement on the subject, but Lord Derby answered that the proposal was "open to so many objections of a political and practical character that [H.M.'s government] could not undertake to recommend it." And he intimated to the Porte and to the khedive (to which rank the pasha of Egypt had been raised in 1867) that H.M.'s government would expect them to "abstain from impeding the navigation of the canal, or adopting any measures likely to injure the canal or its approaches; and that [they] were firmly determined not to permit the canal to be made the scene of any combat or other warlike operations[1]."

The general acquiescence in the principles thus laid down by Great Britain and Russia, and the use of the canal, subject to them, by both Russian and Turkish ships of war, established an unquestioned understanding that no hostilities or warlike operations should take place in the canal, that its mouths should not be subject to blockade, that on that footing the canal should be free to ships of war of belligerents, and that the territorial power, if a belligerent, should stand in those respects on the same footing as any other power. From these lines there has not since been any deviation, though more had to happen and be determined before their embodiment in a convention. Contrasting the system with that in force for the Sound and Belts, we see that the territorial power, if belligerent, enjoys a protection from hostilities in the artificial strait and from blockade at its mouths which is entirely wanting to him in the natural straits; that neutrals may profit by that prohibition of blockade in cases where, if the strait were a natural one, they would have no security for their commerce but that resulting from the territorial character of the water which might otherwise be the scene or base of a given operation; and that on the other hand the territorial power is obliged to permit the free passage of his enemy, which in a natural strait he is not[2].

[1] *Annuaire*, 1879/80, pp. 112, 113, 126; Parliamentary Papers, Egypt, no. 1 (1877), and Russia, no. 2 (1877).

[2] See above, p. 193.

In the summer of 1882 the insurrectionary movement of the Egyptian army under Arabi Pasha was generally considered to threaten danger to the canal. Arabi had expressed his intention of respecting its immunities, but the same confidence could not be felt in the intentions of a revolutionary government, and of leaders not yet firmly seated in their places, as in those of rulers tested by experience and holding a responsible position in the commonwealth of nations; and confidence is the life both of statesmanship and of trade. A conference was sitting at Constantinople on the means to be taken for restoring order in Egypt. Signor Mancini, the Italian minister for foreign affairs, had desired from the first that it should undertake the preparation of a complete international agreement with regard to the canal, but he did not succeed in getting its object so extended. When the danger to the canal was considered to have become imminent, England invited France and Italy to join her in measures for its protection. M. de Freycinet agreed, but the French chamber threw out his bill for a pecuniary credit for the purpose, and his ministry was replaced by that of M. Duclerc. Mancini also agreed, but only on condition that the protection should take the form of a maritime police in which it should be open to all interested powers to join, and that operations on land should be reserved for a further understanding in case they should become necessary. At the twelfth meeting of the conference the Italian representative made a proposal in that sense, so worded as to seem to point to a permanent international maritime police for the canal. At the fifteenth meeting Germany, Austria, Russia and Turkey adhered to the proposal; and England did so also, but on condition of the measure being only temporary, and reserving the right of any power to land troops for the security of the canal, and, expressly, her own military operations undertaken with a view to the restoration of the khedive's authority. But the conference was already moribund; joint action by all the powers for the protection of the canal could scarcely be hoped for by the most sanguine; and Prince Bismarck had objected to a mandate for action being given by all the powers to some of them, because it would, he said, "create an unlimited responsibility for the measures resorted to, without control over them and without the possibility of withdrawal." The isolated

action of England remained as the only practicable course, and in spite of the formally correct protest of M. de Lesseps Sir Garnet Wolseley's expedition entered the canal at Port Saïd, sailed through it to Ismailia at its centre, there disembarked troops and munitions of war, and made Ismailia the base of the operations which resulted in the victory of Tel-el-kebir and the occupation of Cairo.

These were warlike operations, such as by the general understanding since the Russo-Turkish conflict were to be excluded from the canal. The party against which they were directed was the actual government of Egypt, and although it was a party of insurgents against a legitimate ruler, yet on that ground to pretend that they were merely operations of police would be equivalent to denying the name of war to Waterloo. But the other powers received them with tacit acquiescence, which must be taken to have shown that no understanding would be allowed to interfere with the task of protecting the canal, when undertaken in case of necessity and in good faith, and carried out with no serious disturbance of commerce.

The occupation of Egypt by England, and her refusal to renew the dual control in that country which England and France had enjoyed before Arabi's insurrection, led to Lord Granville's circular of 3 January 1883 to the powers in which, among other things, he stated the bases of an international agreement with regard to the canal which H.M.'s government thought might be concluded with advantage. It is not necessary to suppose that he thought differently from Lord Derby of the political and practical objections to which the proposal of such an agreement might be open, but it was plain that the other governments would require some more express security for the freedom of the canal, now that it had practically fallen into the hands of a strong state, than they had been content with while the territorial power, virtual as well as nominal, was a weak one. From this date therefore the question of fixing the legal system of the canal by treaty was regularly before the world. In 1885 a commission of delegates met for the purpose at Paris, Spain and the Netherlands, and Egypt with a consultative voice, being represented on it as well as the great powers including Turkey. The result was a draft to which the only objections were made

by England and Italy. The most important objection related to an article prohibiting acts of war, or preparatory to operations of war, being done "in the approaches to the canal or in the territorial waters of Egypt." England and Italy desired to substitute "in the ports of access, as well as within a radius of three sea miles from those ports"; while the other powers, in maintaining the words objected to, reserved the extent of the territorial waters of Egypt for an ulterior agreement. The Russian delegate, M. Hitrovo, had maintained, in the sitting of 11 June, that "the treaty would be illusory unless the approaches of the canal were made to comprise a neutral passage through the Red Sea into the Gulf of Aden." Afterwards the negotiations were resumed between England and France, who in October 1887 agreed to an amended draft, which was signed by Turkey and the other powers on 29 October 1888 and is known as the Suez Canal Convention.

The ratifications were deposited at Constantinople on 22 Dec. 1888, but not exchanged. At the conference in 1885 M. Barrère, one of the French delegates, as reporter of the drafting committee, stated that it had abstained from examining how far the treaty which it was preparing was compatible with the then transitory and exceptional condition of Egypt. And at the close of the conference the British delegates, in presenting such a draft as their government was prepared to accept, stated that they "consider it their duty to formulate a general reservation as to the application of its provisions in so far as they would not be compatible with the transitory and exceptional state in which Egypt now exists, and as they might fetter the liberty of their government during the occupation of Egypt by the forces of Her Britannic Majesty." In 1887 Lord Salisbury accompanied his acceptance of the Anglo-French draft by a renewal of that reservation, which it may be presumed has not been unconnected with the delay in the exchange of the ratifications of the Suez Canal Convention. Now, by art. 6 of the Anglo-French Declaration of 8 April 1904 respecting Egypt and Morocco, "H.B.M.'s government declare that they adhere to the stipulations of the treaty of the 29th October 1888, and

[1] Parliamentary Papers; Egypt, no. 19 (1885), p. 305; Egypt, no. 1 (1888), p. 36.

that they agree to their being put in force"; so it is to be expected that the ratifications will be exchanged, if they have not already been so. But whether with or without an express reservation, it must be considered that, in future as in 1882, rules having the freedom of the Suez canal for their object cannot be interpreted as hindering the protection of that freedom by the power best able to give it, in good faith and with no avoidable disturbance of commerce.

The articles of the Suez Canal Convention may be summarised as follows. Art. 1: The canal is to be open, in war as well as in peace, to ships of war and merchant ships of all flags; and is never to be blockaded. Arts. 2 and 3 relate to the security of the company's property and of the freshwater canal. Art. 4: No act of hostility, or intended to obstruct the free navigation of the canal, is to be done in the canal or its ports of access, or within three sea miles of those ports, even should the Porte be a belligerent power. Arts. 4 to 7: Particular provisions relating to ships, munitions and material of war, prizes and troops, which will interest us when we come to the laws of war. Art. 8: The duties of the representatives of the signatory powers in Egypt with regard to securing the freedom of the canal, now modified by the Anglo-French declaration above referred to. Arts. 9, 10, 11: The duties of the khedive and the Porte with regard to securing the freedom of the canal. The immunities of the canal are not to apply to measures taken for the purpose by the sultan, or by the khedive in his name, with their own forces, or to those which the Porte may concert for the purpose with the other powers. But in any case the measures are not to be an obstacle to the free use of the canal, and permanent fortifications are not to be erected. Art. 12: No power is to seek territorial or commercial advantages, or any privileges, with regard to the canal. But the rights of Turkey as the territorial power are reserved. Arts. 13 to 16: Not here important, except that the convention is not to be limited by the canal company's concession, which is one of 99 years.

In dealing with the extension of the system thus established to the other, still future, artificial interoceanic waterway of the world, we are not concerned with the negotiations and questions relating to the right to construct and regulate the latter. They

ended in the supersession of the Clayton-Bulwer treaty of 19 April 1850 between Great Britain and the United States by the Hay-Pauncefote treaty of 18 November 1901 between the same powers, and in the purchase by the United States of the half executed Panama canal, and a treaty between them and the new republic of Panama, through whose territory it passes. The result is that the United States fully enjoy so far as concerns that canal, and enjoy as against Great Britain so far as concerns any other route which the intended waterway between the Atlantic and Pacific oceans may take, the right of completion or construction, as well as the exclusive right of regulation and management of the canal when finished; in short, a position combining that of the Suez Canal Company with that of the territorial power. For their conduct in exercising those rights the United States adopt by the Hay-Pauncefote treaty, as the basis of what is called the neutralisation[1] of the canal, "the following rules, substantially as embodied in the convention of Constantinople for the free navigation of the Suez canal, that is to say: (1) The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation or its citizens or subjects, in respect of the conditions or charges of traffic or otherwise. Such conditions and charges of traffic shall be just and equitable. (2) The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it. The United States however shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder." The remaining rules are practically similar to those of the Suez Canal Convention relating to ships, munitions and material of war, prizes and troops, and to the security of the property connected with the canal, rule 5 expressing that the provisions "shall apply to waters adjacent to the canal within three marine miles of either end."

To the system thus established for the Central American canal of the future the express assent of the European states has not been invited. Their assent may be assumed from their own

[1] It is not really neutralisation, since neutrality does not admit the passage of belligerent forces across the territory.

establishment of the same system in the old world, and because the concurrence of the two great powers of North America must carry for that part of the new world something of the same authority which the concurrence of the great powers carries for the old, especially with relation to a waterway so vitally affecting the communication between the Atlantic and Pacific coasts of each. We may treat the conditions, under which interoceanic ship canals can be made conducive to commerce and all peaceful development, as being henceforth an ascertained part of international law.

NOTE.

The latest development of the law of the Suez canal has occurred while this volume was passing through the press. During their war with Japan the Russians made prizes in the Red Sea of neutral ships alleged to carry contraband of war, and desired to carry them home for adjudication through the canal. "Now the 1888 Convention, amongst other provisions, declares that the canal shall be free and open alike to warships and to prizes. But a prize in the ordinary acceptation is a vessel manned by the captors. The captors of the vessels referred to, having neither officers nor men to spare for such a purpose, found themselves in a difficulty. For according to advices cabled from Cairo, the Council of Ministers had, in view of the captures or their probability, resolved that no belligerent warship should be allowed to escort a prize through the canal. The decision was eminently wise, for cases are not unknown of attempts at rescue or escape, and any such event in the narrow water of the canal might easily result in the blocking of the passage. In this difficulty the Russians decided to release their prizes." *Times* of 25 July 1904, "from a correspondent."

APPENDIX.

INTERNATIONAL ARBITRATION,

BEING AN ARTICLE WHICH APPEARED IN THE INTERNATIONAL JOURNAL OF ETHICS FOR OCTOBER 1896.

[*This article is reprinted as it stood, its substance being still applicable. The reader is referred to pages* 289—292 *above.*]

1. *International Arbitration contrasted with International Government.*

In the early years of the seventeenth century, Henry IV of France and his minister Sully were busy elaborating what they called the Great Design. Christian Europe, excluding Muscovy, was to be formed into an organised body with a government—legislative, judicial, executive—backed by a common force of two hundred and seventy-three thousand soldiers and one hundred and seventeen great ships. For this purpose its political boundaries were to be rearranged in a very thorough-going manner, so that six hereditary and six elective crowns with three republics should form the fifteen states of the federation, sufficiently equal in strength to secure its stability. Even the internal affairs of these states were to be so far subject to the common government that domestic wars of religious and political factions should be prevented equally with international wars. The king and the minister well knew that such an institution could only be established by force, and it may be doubted whether they dreamed of its establishment as possible even as the result of the enterprises which Henry was preparing when the knife of Ravaillac ended his life.

But even the visions with which kings and ministers amuse themselves require some explanation when they depart so far from the common. Arbitration and mediation were not unknown. There has never been a time in history when they were unknown, and they had often been the instruments of maintaining peace. Why, then, did Henry and Sully not take them as the basis of the method by which they dreamed of securing perpetual peace? The answer is that the renaissance had not quite spent its force, and the renaissance, like France herself, was bold and logical. Over independent states there could be no power to enforce submission to arbitration or performance of an award. The path which had led to the existence of so much social order as was enjoyed within a state was the submission of individuals to government. Perpetual peace could not exist between states unless they, too, submitted to some government, sacrificing a part of their independence to found an ordered commonwealth of nations. At the same time the slow processes of evolution had not been studied; what the best spirits of that age saw to be ultimately necessary they could not believe to be immediately impossible.

The vision of the Great Design long haunted thinkers, though statesmen had done with it. Saint Pierre, Bentham, and Kant in the eighteenth century—even Saint Simon in the opening of the nineteenth—formed projects of perpetual peace founded on the submission of states to government, though, not having armies at their back, they could not imitate their illustrious forerunners by proposing the preliminary rearrangement of Christendom. But now thinkers, too, are no longer under the spell. They have turned from sketching imaginary international governments to the more practical, or more immediately practical, task of promoting international arbitration. Two powerful causes have contributed to this change of line.

First, the idea of national independence has grown so much in strength that even a theorist would now hesitate to advocate the surrender of any part of that independence. The world of Henry and Sully was one in which a very large number of men, including many of the best and most earnest, felt themselves nearer, even for purposes of action, to foreigners of their religion than to their fellow-countrymen of a different religion.

Of this state of things the only remaining trace is the sentiment which would disturb national politics in order to restore the temporal power of the papacy—a sentiment of such limited influence that it may be regarded as one of those exceptions which prove rules—the rule in this case being the supremacy of the state tie in the modern world. Again, in the time of Henry and Sully the liberties known and valued in the larger part of Europe were chiefly provincial and municipal liberties. If these were left untouched, a province or a city bore with equanimity its transfer from one larger political aggregate to another, in neither of which was it allowed much influence on the conduct of the greater affairs of state. But now every Christian country is permeated by a national life; its people are powerful and conscious factors in determining its international attitude, even though their power to do so may not be recognised in its constitutional forms; they are deeply attached to the independent national existence which they feel to be their own existence.

Secondly, abundant experience of international arbitrations has proved that the awards given in them are generally carried out. Logic may reiterate the warning that there is no security for their being carried out, but the theoretical imperfection of arbitrations arising from this cause is not felt to be practically a great deduction from the value of the service which they can render to peace.

The two causes which have been noticed may be summed up by saying that thinkers have turned from schemes of international government to promoting international arbitration, because the surrender of any part of national independence is felt to be at once less possible and less necessary.

Here, however, before I leave the subject of international government, I would guard myself against being supposed to imply that the ultimate destiny of civilisation will not be in that direction. What is clear is that an ordered commonwealth of nations will not come about by constitution-mongering, but it is not clear that evolution is not working for it. Let any one consider the authority which during the present century has been assumed by the great powers of Europe, and exercised by them at the Congress of Vienna in 1814–15, and at that of

Berlin in 1878. Let him consider the prohibitions against exercising the belligerent right of blockade, to which powers not recognised as great ones have now to submit—as the Chilian insurgents of 1891, who were not allowed to blockade Valparaiso and Iquique, though their belligerent right in respect of contraband of war was not disputed; and Japan, which was not allowed to blockade the treaty-ports of China. It will be difficult for him to resist the conviction that the tendencies are already in operation which in a remote future may crystallize into some form of international government. But the hint, though it may be given, is not one on which it would be useful to enlarge. In certain matters of politics it is easier to look forward a thousand years than fifty. By observing the point towards which the great streams of tendency in history converge, a glimpse may sometimes be obtained of a distant goal, but the route by which that goal will be reached will depend on those unpredictable combinations which we call chance. Your friend is in London; you have reason to believe that he is going to Edinburgh, but whether he will travel by York, Leeds, or Preston depends on circumstances in his affairs of which you are ignorant. The streams of tendency may be deflected in their course by obstacles which loom large for a time and then disappear in their turn. We may believe that a thousand years hence there will be a United States of Europe and a United States of all America, without pledging ourselves to the belief that that consummation will be sensibly nearer fifty years hence than it is now. Our duty in the interest of peace is to pursue it on the line which at present is that of least resistance, and that is certainly the promotion of international arbitration without demanding an organised security that the awards of arbitrators will be obeyed; in other words, without trying to convert international arbitration into international judicature.

2. *Arbitration contrasted with Mediation.*

Having thus cleared the ground for our subject on one side by contrasting arbitration with government, it will be well to clear it on another side by pointing out the difference between

arbitration and mediation. Arbitration is a proceeding in which a difference is referred, by the agreement of the parties, to the decision of one or more arbitrators. The agreement may be a special one made for the case, or it may be a general one for referring differences of a certain defined class, whenever such may arise between the parties, or it may be one for referring all differences which shall arise between the parties. The essential point is that the arbitrators are required to decide the difference—that is, to pronounce sentence on the question of right. To propose a compromise, or to recommend what they think best to be done, in the sense in which best is distinguished from most just, is not within their province, but is the province of a mediator.

Arbitrations may take place either between private persons in a state or between states. If the parties are private persons, the agreement by which they refer their difference to the arbitrators may be a binding one by the law of their state, so that, as the result of contract, the award of the arbitrators will be enforced as effectually as if it were the judgment of a court. When the parties are sovereign states, the sentence of the arbitrators will merely create a new right between them. Suppose that state A was in the right in the original difference, but that the award is given in favour of state B, the good faith of the arbitrators being unimpeachable, B now has a right by contract to have the award performed, though it cannot invoke any legal process for its enforcement. If B was also originally in the right, it has this new right added to its original claim.

Mediation also may take place either between private persons or between states, only in the former case the term would scarcely be used, because it is so simple for private persons to seek the advice of a common friend that a formal name is scarcely wanted for the proceeding. But between statesmen giving advice is a serious matter. Neither between private persons nor between states does a new right arise out of the advice given, but when a state commits itself to an opinion about what two other powers had best do, the hope arises on the one side and the fear on the other, or perhaps the fear on both sides, that it may interfere actively in support of its

opinion. Even if the state which has given the advice is so plainly without any interest in the question that its interference is not to be expected, still, the advice may add a moral weight to the side towards which it most leans, and moral weight is of great importance in the society of states, in which approval or disapproval has to find an outlet in any way that it can, for want of organised channels in which its pressure may be brought to bear. Hence, between states, trying to bring two parties together by any amicable means, even without passing sentence on the justice of their respective claims, is an important proceeding known by the technical name of mediation, or, in its less formal shape, by that of good offices.

We may now mark the position of international arbitration as a mean between mediation on the one hand, and the Great Design, or what Tennyson called "the parliament of man, the federation of the world," on the other hand. Unlike mediation, arbitration calls for a sentence; but, unlike the Great Design, arbitration, when international, calls for no enforcement of that sentence, trusting to the good sense and good feeling of the party against whom it is pronounced, and to the pressure of international opinion on him.

3. *General consent that there are limits to International Arbitration.*

Such being the nature of the subject with which we are concerned, the first question which meets us is whether the efforts of statesmen should be limited to promoting arbitration in every special instance to which it seems possible to apply it, or whether they should try to conclude general arbitration treaties, by which the states that may be parties to them shall agree to refer to arbitration either all their differences or all falling within a certain description. Here we encounter at the outset the fact that scarcely any one appears to think that the reference of all international differences to arbitration is possible. The Pan-American Congress of 1890 adopted a "Plan of Arbitration," of which article 4 ran thus: "The sole questions excepted from the provisions of the preceding articles are those which, in the judgment of any one of the nations

involved in the controversy, may imperil its independence, in which case for such nation arbitration shall be optional, but it shall be obligatory upon the adversary power." This plan received the votes of sixteen of the nineteen American republics, including the United States, the three wanting being Chili, Uruguay, and San Domingo. Similarly, M. Dreyfus, one of the latest and most enthusiastic supporters of arbitration, writes: "There are controversies to which there can be no obligation to apply it. When the independence or the integrity of a nation is at stake, all the treaties in the world could not force that nation to accept it[1]." Other writers add honour to independence and territorial integrity as excepting a difference from arbitration. It is true that treaties have been concluded by which states have pledged themselves to refer to arbitration all differences without exception, but so far as I am aware these have only been between Switzerland, Spain, or Belgium on the one side and American or African republics on the other side, and between Portugal and the Netherlands; all of them countries between which any difference falling within the principles of exception above noticed is so improbable that their governments might well think it unnecessary to be at the trouble of formulating a condition to meet such a case. We must then admit that, by general consent, there are some limits to international arbitration, and we have to ask whether it is possible to assign those limits in a treaty with sufficient clearness.

4. *Can the limits to International Arbitration be assigned?*

The word "independence," when used in this connection, is extremely vague. The independence of a nation is at stake, not only when the continuance of its separate existence as a nation is directly brought into question, nor even only when the question is one of reducing its limits so far as to make it difficult for the residue of the nation to maintain its separate existence. A state is injured in its independence whenever,

[1] *L'Arbitrage International,* par Ferdinand Dreyfus, avec une préface de Frédéric Passy, membre de l'Institut, Paris, 1892, p. 355.

without menacing its separate existence, it is hindered in doing or not doing anything that an independent state may justly do or abstain from doing. Such a case will never appear on the face of an arbitrator's sentence, because the sentence will always profess to follow the principles of justice in what it awards to be done or not to be done, but it will exist in fact whenever the sentence does not really follow the principles of justice. Therefore a clause in an arbitration treaty, by which a signatory state is allowed to refuse arbitration whenever in its judgment the controversy imperils its independence, will bear the interpretation that it may refuse arbitration whenever in its judgment a decision adverse to it would be so plainly unjust as to be an outrage to its independence. An exception, however, which was openly expressed to be of that width would go far to destroy the value of the treaty; while, on the other hand, if it should be meant to restrict the exception to cases in which the continued existence of the state as a separate member of the society of nations is thought to be imperilled, then, first, it should be distinctly so expressed, and, secondly, it is doubtful whether any two great powers would conclude a mutual arbitration treaty in which the exception was so restricted.

The word "honour," though as above mentioned it has been used by writers, need not be particularly considered. If any satisfactory definition could be reached of the outrage to independence which should exempt a difference from arbitration, that definition would cover all the cases in which the honour of a nation was so deeply at stake as to make arbitration impossible.

It is, perhaps, not difficult to perceive the idea which underlies all the limitations of arbitration that have been proposed. It turns on the distinction between legal and political questions. Legal questions are suitable for arbitration; political questions are in general not so. But the terms "legal" and "political," though they would probably be found intelligible enough for practical purposes, are not suitable for use in a treaty, seeing that they are not technical terms of international law recognised in diplomacy for the purpose of expressing a distinction. It will be worth our while to analyse the distinction which they are suggested for expressing, and if

the analysis should not result in hitting on language which might be used in a treaty, it will at least clear our views on the subject.

By a legal difference between states, one is meant which can be settled by reference to known rules, having at their back that force which is derived from the general consent of the international society. We have nothing here to do with the circumstance that the force referred to, though very real, is unorganised, and therefore irregular in its action. Having agreed, as students of international arbitration and not of international government, to dismiss the question of enforcing awards, we have nothing to do with the mode of action of the force in question. We have only to do with the existence, in favour of each particular rule, of the consent from which the force arises. The rules which must govern a difference between states, in order that it may properly be described as a legal difference, must be known and generally consented to as the ground of international action, whatever form that action may take. This may be illustrated by examples.

An arbitration is now pending between Great Britain and the Netherlands, the distinguished Russian jurist, M. Fr. de Martens, being the arbitrator, in which damages are claimed for Carpenter, the captain of an Australian ship, the "Costa Rica Packet," by reason of his arrest in the Dutch East Indies and the mode in which he was dealt with there by the Dutch courts. Here the award must turn on the questions whether the Dutch authorities had jurisdiction in the case, and whether they exercised their jurisdiction in substantial conformity with the practice of civilised nations. International law is clear that the claim must fail if these questions are answered in the affirmative, and all that will be required, beyond the ascertainment of the facts, is therefore Dutch law and a moderate dose of comparative jurisprudence. No case could more clearly be suitable for arbitration.

Next let us consider the recent Behring Sea arbitration. No part of international law is better settled than the rules for the exercise of authority in time of peace on the high seas, and the conditions under which any part of the sea can be claimed by a state as being within its exclusive sovereignty are equally

clear, subject to some question of measure in cases near the border-line of right, which did not arise with regard to the Behring Sea, and which, if it had arisen, would have fallen as reasonably within the discretion of an arbitrator as certain questions of measure in applying the principles of national law fall within the discretion of a judge. Here therefore was another legal difference marked out for arbitration by its nature, though the rules to be applied were exclusively those of international law.

Now pass to the famous "Alabama" arbitration. Here there had been a divergence of opinion between Great Britain and the United States as to the international rules with regard to the conduct required from neutrals in war, and so long as that divergence continued the question was not one for arbitration, unless any one will contend that arbitrators should be intrusted with the power of fixing doubtful law, as to which more will be said later. At any rate, the divergence in question made it impossible to settle the difference between the countries by rules known and consented to, and so prevented its being what is here called a legal difference. But as soon as the parties agreed on the Three Rules as applicable to the case, it only remained to apply those rules to the facts; in other words, the difference became a legal one and suitable for arbitration.

As an example of a political difference we may take the following: By the treaty of Paris, which England and France imposed on Russia in 1856, at the close of the Crimean war, the Black Sea was neutralised, and Russia and Turkey engaged not to maintain or establish any maritime arsenal on its coast. Experience has not shown that such limitations of what a great power may do within its own territory can be permanently upheld, however their imposition may suit the circumstances of a given moment; but where, as in this case, the treaty does not fix a term for its duration, the lapse of time or the change of circumstances that may give a claim for its rescission is quite indefinite. The claim to rescission depends on the political configuration of the world. How far have the dangers ceased to exist against which the limitation was intended to provide? And in answering this it must be remembered that not only the

might of the different powers has to be looked to, but also their respective policies and designs. Again, if the dangers against which the limitation was intended to provide have not ceased to exist, it may still be asked whether the limitation is any longer the wisest method of providing against them, whether the attempt to perpetuate it would not cause greater dangers in the actual political configuration. These are questions which elude all definition by rules. In 1871, Russia, taking advantage of the disablement of France, denounced the clauses which were obnoxious to her and proceeded to re-establish her arsenal at Sebastopol. The opinion was widely, perhaps generally, entertained in England that Russia had no fair claim so to act, but it was beyond the strength of any single power to maintain the clauses. A conference was assembled, a verbal tribute was paid to the binding character of treaties, and the limitations were removed by consent. Now, suppose that France had not been disabled, and had concurred with England in thinking that the Black Sea clauses of 1856 ought to be maintained, could such a difference between those powers and Russia have been referred to arbitration? An arbitrator must have said that from a legal point of view, which was the only one he could entertain, there were not two sides to the question; that it was past all doubt that a state cannot by a unilateral act put an end to a stipulation it had signed. But would any great power have been content for the political question to be so disposed of? Clearly not. As little would Parliament be content to be prevented from modifying contracts on the ground of public policy by the declaration of a judge, true as it would be, that a party cannot free himself single-handed from a contract. Till "the parliament of man" becomes a fact, powers have to do for themselves what parliaments do for private persons. The case supposed would have been one in which the claim for relief would not have been repugnant on its face to the principles of international law. Almost all theorists on the subject agree that the tacit but undefined condition, *rebus sic stantibus*, is attached to treaties. Even in England, thinkers like J. S. Mill approved the claim of Russia to relief. But the claim did not admit of being put in a legal shape, because the appreciation of the circumstances on which its true

value depended could not be reduced to rule, but was a question for statesmen.

Two objections may be anticipated to what has just been said. One will come from those who desire that every international difference shall be settled on what have been here distinguished as legal grounds—that is, by rules known and consented to. They would condemn all international action which could not show such a ground, and respect the existence of every legally existing arrangement for the alteration of which the approval of every state concerned could not be obtained. But not much time need be spent in repudiating a view of international duty which, for example, would condemn all interference on behalf of the Armenians or the Cretans, because it is impossible to qualify the independence of the Sultan or of any other power by legal definition.

The other objection will take this shape. It will be admitted that arbitration, strictly speaking, is a proceeding for obtaining a sentence on the legal right or wrong of a dispute. But it will be said that that is not what was meant in advocating arbitration as capable of being resorted to in all international differences. It will be said that every international difference can and ought to be referred to some one with power to settle it in one way or another; on legal grounds if such can be found and are satisfactory; if not, then on all the grounds which would be open to statesmen in dealing with the case. The arbitrator is to be both judge and, if need be, legislator. He is to combine the offices of arbitrator and mediator, with the addition that when in the latter character he proposes a solution not as what is legally just, but as what is best, his proposal shall have what the advice of a mediator has not, the same force as the award of an arbitrator, binding the parties and creating a new right between them. But this objection is not more practical than the other. It is very likely that in some cases of no great importance two nations may by special agreement create over themselves a jurisdiction of so far-reaching a character, but it is not to be imagined that any nation should in advance surrender its destiny to such a jurisdiction by a general treaty.

5. *Conclusions from the foregoing.*

The foregoing considerations may lead us to the following conclusions:

International arbitration is not a proceeding that can ever be applicable to all international differences, and some reservation must therefore be contained in every general arbitration treaty.

It is difficult to describe the cases which are intended to be reserved by any terms which the negotiators of general arbitration treaties could trust to be understood in any precise sense, though some help may probably be given by well-chosen words. Even the danger to independence, which the Pan-American plan gives as the only reason for declining arbitration, may be a useful expression to employ, though it will not bear defining further. The reservation, in whatever terms it may be couched, must leave it substantially to the parties to decline the application of the treaty whenever they think it necessary to do so.

But the nature of the cases which will not admit of arbitration is clear enough, both from the reason of the thing and from the experience of arbitrations which has been gained, to make it probable that between parties of good faith there will be little difference of opinion as to the applicability of the remedy in particular cases. Therefore between such parties the employment of loose words to express the reservation will probably not do much harm. On the other hand, every refusal to apply a general arbitration treaty in a case in which it ought to be applied will embitter the original difference by adding a charge of bad faith to the original cause of difference. It will therefore be best to abstain from concluding general arbitration treaties except between states which can count on one another to work them in good faith.

I believe that Great Britain and the United States are nations between which a general arbitration treaty may usefully be concluded, provided that it be concluded, not under the impression that any treaties can be panaceas for international differences, but after such discussion as may enlighten both nations about the reality and meaning of the reservation which the treaty will have to contain.

6. *Should all questions of Law be referred to Arbitration?*

The cases for international arbitration have been described as legal ones, without pretending to scientific accuracy, but it is hoped with some practical degree of clearness. On this it may be asked whether, even where law is concerned, it is proper to intrust arbitrators with an unlimited power of declaring it. Where the law is so openly a matter of controversy that that controversy is a principal part of the difference to be settled, in which case the difference is not a legal one in the sense of calling only for the application of known and admitted rules, it is scarcely possible to regard an arbitration as a proper means of declaring the law. International jurists of any eminence will almost certainly be known to lean to one side of the question or the other, and will therefore be unacceptable as arbitrators. Other jurists, and even judges of state courts who are not eminent international lawyers, would not be considered qualified to take what would be a great step towards legislating for the world on subjects with which they are not conversant. Crowned heads and statesmen, accustomed to weigh such questions, and acquainted by experience with their ramifications and bearings, are the class by whose judgment the disputed rule will in the main be ultimately fixed; but this will only be by their judgment as a class, when time and the varying circumstances of different occasions have eliminated transient bias. Impartial and wise members of that class are difficult to find on each particular occasion. The best, and perhaps the only, way in which cases of disputed international law can be submitted to arbitration is that which was adopted in the "Alabama" case—namely by the parties agreeing, if possible, on rules to be applied *pro hac vice*, leaving those rules to make their way in the world afterwards or not, according to their merit.

But another case may arise. The international rules to be applied may be well known and generally consented to by civilised mankind, and the claim of one party may have been brought forward in defiance of them. Is it a duty of the other party to submit to an arbitration on such a claim? Demands made in open defiance of law are common enough in private life, and are sometimes pushed as far as into the courts of justice,

which in that event have the means of dealing with them quickly and sharply enough. They cannot be excluded from the courts, and the protection which private persons enjoy from the law of the land compensates them for the occasional annoyance which arises from the courts being open to all. But the law of nations, wanting as it is in organised instruments, confers no equal protection. Is it therefore always a sufficient argument as between states, "if your case is so clear, trust it to an arbitration"? This is a very important question, both as to the use which a state may properly make of the liberty reserved to it in a general arbitration treaty, and as to the propriety of refusing an arbitration in the absence of such a treaty. An illustration will best enable it to be understood, and one is unhappily at hand.

In the difference now pending between Great Britain and Venezuela as to their boundary in Guiana, the Venezuela case avowedly comprises the following points: I do not say that it rests on them, for we are not here concerned to enquire what other points it may comprise. It is alleged (1) that the whole of Guiana came under the sovereignty of Spain by means of a papal grant and of discovery; (2) that the effect of these titles in conferring sovereignty was not and is not limited by possession in fact, wherefore the Dutch could not advance by settlement, even over unoccupied territory, beyond the limits within which Spain recognised them by the treaty of Munster in 1648, while the Spaniards were free to extend their settlements beyond the limits which they had then reached; and (3) that, on questions of territorial sovereignty, international law admits no prescription but an immemorial one. Now, international prescription, short of being immemorial, is admitted in principle by the great majority of jurists: no term of years has been fixed for it, and the necessary term may well vary with the circumstances, and be left to the decision of arbitrators if the principle be conceded. And the doctrines put forward by Venezuela concerning the papal grant and discovery without possession had been denied by Queen Elizabeth as early as 1580; the American colonies of England, past and present, had been built on their denial; they are not maintained by any school of jurists; and the King of Spain had placed himself on much

narrower ground during the Nootka Sound controversy in 1790. In these circumstances it appeared to me that the doctrines adduced were frivolous, but that the demand for an arbitration on them was supported in a manner which might make mere frivolity serious. I accordingly wrote (London *Times* of 10th February, 1896) that it did not lie in the mouth of any nation to say that its claim was reasonable enough for it to be entitled to an arbitration on it, and at the same time that the other party might feel secure of the arbitrators rejecting it. And I recommended that England, by a proceeding similar to that of the United States in the "Alabama" case, should make it the condition of an arbitration that certain rules of law relating to the title to territory should be laid down to guide the arbitrators, or else should limit an arbitration to such part of the territorial claim of Venezuela as did not plainly depend on the inadmissible doctrines.

My opinion on the particular case which has been mentioned may have been sound or otherwise. But in an article on international arbitration it would be impossible to pass over the point that a self-respecting nation can scarcely be called on to discuss before arbitrators doctrines which cannot be denied without impertinently calling in question its own history and the general judgment of the world.

7. *The Use of Mediation.*

Where the difference between two states is what has been roughly described as a political one, or where for any other reason an arbitration is impossible, it is a plain duty to seek the good offices or mediation of friendly powers. It is very unfortunate that this is so rarely done, at least in circumstances promising success to the remedy. Thus, the plenipotentiaries assembled at the Congress of Paris in 1856 recorded in their protocols the wish that states, "before appealing to arms, should have recourse, as far as circumstances may allow, to the good offices of a friendly power"; and in the treaty which they concluded it was stipulated that, before the employment of force between Turkey and any of the other contracting parties, an opportunity should be afforded of preventing such an extremity by the mediation of the other contracting parties.

Turkey appealed to this stipulation in 1877, as an answer to the declaration of war against her by Russia, after all the circumstances had been the subject of prolonged discussion between her and the great Christian powers, whose united demands she had refused; and the appeal was naturally in vain. Though Russia alone was in arms, it was Christian Europe with which Turkey was in difference, and her appeal for mediation was substantially an appeal to her opponents to abandon, and to induce Russia to abandon, a part of their exigencies. If, in pursuance of the wish expressed by the plenipotentiaries of 1856, France and Prussia, in 1870, had invoked the mediation of the powers which were not concerned in their difference, there can be no doubt that means might have been found to save the honour of each country without a resort to war.

It may be further observed that there is a class of cases in which mediation might usefully be combined with arbitration —namely, where a difference which calls for the application of legal rules can nevertheless not be entirely disposed of by such rules. For instance, suppose that in a boundary dispute referred to arbitration it appeared that there was some territory to which neither party could establish a title in accordance with the acknowledged rules of international law. It would be desirable that the arbitrator, after awarding to each party all that it could lawfully claim, should possess the power of a mediator to propose a division of what remained. And he might be clothed with that power by special agreement, where the possibility that occasion might arise for its exercise could be foreseen. I proposed that this course should be taken in the difference between Great Britain and Venezuela, considering that, after due effect had been given to possession and prescription, there might remain forests untrodden by civilised men to which no legal title could be made out (London *Times*, January 6, 1896).

8. *General Conclusion.*

It now only remains to impress on all whom this article may reach the duty of promoting international arbitration. To the statesmen who are believed to be engaged in negotiating

some general arbitration treaty between Great Britain and the United States, it is only possible to wish Godspeed. Those who are not engaged in such a task can more usefully occupy themselves with ideas than with plans: too little can be known from the outside of the mental attitude of those who are concerned in negotiating the treaty, or who will be chiefly concerned in working it if concluded, what difficulties may appear to them the most formidable, and what amount of goodwill and flexibility can be relied on for overcoming in practice difficulties that look formidable on paper. And after all, a treaty of which the philanthropic provisions can only be concluded or applied with reservation bears a resemblance to those formal promises of amendment of which the moral value to a sinner depends on at least an attempt being made to carry them honestly into effect. Without such an attempt, the idle words may scarcely have even the negative merit of insignificance which may be predicated of the Paris protocol in favour of mediation, they may lull the conscience to sleep and discredit a good cause. What is wanted is actually to have an arbitration on every international difference which can be brought to admit of it, whether by application of a general arbitration treaty, if there should be such a treaty between the parties, or by special arrangement for the case. Every actual instance confirms the habit: it secures peace on the occasion, and makes it more likely that peace will be secured on future occasions.

I spoke just now, advisedly, of international differences which can be brought to admit of arbitration. The great number of international arbitrations which there have been in recent years is sometimes paraded as though we were in the presence of the beginning of a process which only had to be continued in order to lead of itself to all but universal arbitration. There is some truth in that view, but there is also another side of the facts. Arbitration is already applied between states to almost every difference which appears on the face of it to fall within the category which has been roughly described as legal. Those are not the differences out of which it need now be seriously apprehended that wars will arise. What is wanted is earnest effort to bring more or less within the range of arbitration differences which do not at first sight admit of it. It

should be considered on each such occasion whether some part of the difference does not admit of arbitration; whether, as to the rest, the powers of a mediator might not be given to the arbitrator; whether, if unlimited arbitration be impossible, it may not be possible to fence a reference by conditions securing the honour of the parties, and those real and great interests which they must not allow to be imperilled. If it should be found practicable to bring the parties together for the quasi-judicial discussion of any points before arbitrators, so much will have been withdrawn from the dangerous part of the case, and their temper for the diplomatic discussion of the remainder will probably have been improved. Shall I go further, and say that even some questions of politics and honour, questions affecting independence in the large and true meaning of the term, may be referred to arbitrators? to persons from whom, as from ordinary arbitrators, a sentence binding the parties should be required, although it cannot be given on legal grounds? It is possible that this may be so, where the questions are not of vital importance, and where the arbitrators are carefully chosen with a view to the special nature of the difference. But to extend the practicable bounds of arbitration in the ways indicated would be something more than to continue a process which can as yet be pronounced to be working, and will demand the active and intelligent co-operation of statesmen and of public opinion on each available occasion.

But for the encouragement of the lovers of peace it may be said that from various causes, some of which have been touched on above, international arbitration is in the air. When this happens to an idea, and as long as it continues to be the case, the power of the idea for good cannot be measured by logic, necessary as it is that we should do our best to understand the conditions in order to work with them. It is the season to raise our hopes, and do our utmost to try what the idea of international arbitration can accomplish.

J. WESTLAKE.

July 2, 1896.

ERRATA AND ADDENDA.

Page 10, line 3: cancel "*positive.*"

P. 13, l. 7: insert, after "Grotius," "so far as it concerns international law and."

P. 32, l. 4 from bottom. The Pragmatic Sanction was brought by the emperor Charles VI before the council in 1713, and made public in 1720: 1723 is about, though we have not been able to ascertain exactly, the date when it became binding by the Hungarian diet's acceptance of it.

Pp. 45, 57. The courts of law are bound by the executive department's determinations as to what new states, whether arising from insurrection or otherwise, shall be recognised, and what territory is recognised as belonging to a given state; but they can act on the public notoriety of such determinations. *Thompson* v. *Powles*, 2 Simons 194; *Jones* v. *United States*, 137 U. S. 202; *Foster* v. *Neilson*, 2 Peters 253; and the notes to those cases in Scott's *Cases on International Law*, pp. 38, 44, 76.

P. 46, l. 16: for "sign" read "adhere to."

P. 56, note. Dr Lawrence's paper is in the *Journal of the Royal United Service Institution* for January 1897.

P. 59, l. 17: Lord Gower was recalled immediately after the 10th of August, but Mr Lindsay remained for a time. M. Chauvelin was a minister, not an ambassador.

P. 60, l. 24: see *United States' Senate Documents*, 1st session of 29th congress, vol. 7, 1845-6, document no. 375.

P. 60, l. 31. Lord Salisbury's argument was not based on any notion that the Anglo-Malagasy treaty could of itself survive the annexation by France, but on assurances said to have been given that the object of the French expedition was to maintain and not destroy the protectorate. See *Parliamentary Papers*; Africa, no. 8, 1897, and France, no. 1, 1899.

P. 109, l. 15: for "Geffersen" read "Geffcken."

P. 114, l. 9 from bottom: for "proportioned" read "in inverse proportion."

P. 145, l. 12. The General Act of the West African Conference of Berlin, art. 26, declared the navigation of the Niger to be open to the merchant ships of all nations, therefore, by implication, not to their ships of war; but art. 22 of the same act contemplated the possibility that ships of war of the signatory powers might enter the Congo. This difference may be explained by the facts that Great Britain and France were already established on different parts of the Niger, while the Congo was unappropriated until the recognition of the International Association of the Congo was completed by its being admitted to adhere to that act, and was therefore regarded in drafting the act as being unappropriated. The liberty contemplated in art. 22 does not, in our judgment, apply to the Congo, now an international river. See however Duchêne, in 2 R. G. de D. I. P. 439, for a different view.

P. 154, l. 7: insert "the" before "due."

P. 160, l. 9. By "public" it is not meant that in Roman law the sea was state property, but that it was one of the *res communes omnium*, not the subject of property at all.

P. 172, note 1 : for *Himelly* read *Himely.*

P. 175. In *Anderson's Case* (1 Wharton's *Digest,* § 33 *a*) the British government admitted that a crime, committed by a British sailor on board a United States merchantman on the high sea, belonged to the exclusive cognisance of the United States.—The great American lakes present a singular case. By the treaty of 1783 the boundary between the United States and British North America was drawn "through the middle" of Lakes Ontario, Erie and Huron, and "through Lake Superior northward of the Isles Royale and Phelipeaux," so that the whole of those lakes is territorial water of one or the other state. But the admiralty jurisdiction of each is held to extend to the whole width of the lakes and connecting rivers, treating them as if they were open sea and straits, so that offences committed anywhere on those waters on board vessels of either country are triable in that country when the vessel and parties are brought within its geographical jurisdiction. *United States* v. *Rodgers,* 150 U. S. 249. This rule is demanded by a convenience amounting to necessity.

P. 199. The protection by Great Britain in foreign states of persons not British subjects is contemplated by the Ottoman Order in Council 1879, and the Orders in Council for Morocco, Persia, the Persian Coast and Islands, and Siam, all of 1889. Hall refers to a convention of 31 May 1839 by which subjects of the Sultan of Muscat, actually in the service of any British subject in his dominions, are to be protected as if they were British subjects, but if convicted of crime are to be discharged from their British service and handed over to the sultan's functionaries : *Foreign Jurisdiction of the British Crown,* p. 138, note 4.

P. 256, note 4. In 1903 the government of the Netherlands refused the execution against a ship at Flushing, belonging to the Belgian state and employed by it as a trainingship for pilots, of a judgment which had been obtained against that state and had been affirmed by the supreme court at the Hague : *R. de D. I. et de L. C.,* 2me série, t. 6, p. 290.

P. 259, last paragraph. The British patent law will be enforced on board a foreign ship in a British port : *Caldwell* v. *Vanvlissingen,* 9 Hare 415. The contrary has been held in the United States : *Brown* v. *Duchesne,* 19 Howard 183. In consequence of the former decision the st. 15 and 16 Vict., c. 83, s. 26 was passed, and has since been replaced by st. 46 and 47 Vict., c. 57, s. 43 ; by which enactments a foreign vessel, on condition of reciprocity being allowed, may use a British patent for her navigation within the jurisdiction of the United Kingdom, but not for the manufacture of any thing to be sold or exported from the United Kingdom.

P. 262. That a private ship is not an asylum for political refugees was recognised by France in *Sotelo's case* (Calvo, § 1130), and by Lord Aberdeen (*Report of Royal Commission on Fugitive Slaves,* p. 154) as to hired vessels carrying mails, which would not be public ships within our doctrine on p. 255. The United States have varied, probably, as Freeman Snow suggests (*Cases on International Law,* pp. 149–151), on account of the exceptional character of the Spanish American states, as to which see our p. 272.

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THE STATE

A Study of Its Equality in International Law

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The Equality of States in International Law. By Edwin De Witt Dickenson, Ph.D., J. D. Cambridge: Harvard University Press.

THE appearance of this volume, the third in the Harvard Studies in Jurisprudence, calls attention with especial emphasis to the significance of the functions of college publishing organizations such as exist not only in Cambridge, but at Oxford, Yale and Princeton. Here is a book on a subject of the law which needs the most careful and intelligent specialization and yet which is so distant from the work of the average lawyer that the few men who are leaders in an understanding of it are great lawyers who can forget profits and rise to heights — generally unremunerative — of contemplation and study, unvexed by the insistent hurly-burly of litigation. Only in the highest sense are these studies practical. They concern the world and mankind and, therefore, are passed by by men. The greatest problem in the world, in the long run, is the relationship of nations. When civilization comes perilously near disintegration, and mankind, panting and dazed, gropes its way, hoping out of its travail to reach a better day, and when an American soldier points out that another great war in this generation is not impossible and that it will mean the final downfall of mutuality and order, there is need for an understanding and development of international law. It is works upon subjects like this that are only in a high sense practical and that have a very limited appeal, works that even the most altruistic of commercial publishers can indulge in but sparingly, which come most within the perview of the University presses.

Despite the belief of the layman, the amount of law which is written in "laws" is only the smallest part of that great fabric upon which the order of any nation depends. Even more is this so of the law between nations. The individual state has its legislature, its courts, its police. When it is at odds with the individual, all these forces are put into play. The community of which nations are the units is without these things except as the tribunals, agreed upon and trusting to concurrence and amity for enforcement of decrees, are effective. If the individual disagrees with his fellow, and that disagreement reaches the degree of importance which makes it necessary to legally settle the matter, the state with all its powers steps in and the individual fellows accept the arbitrament as final, no matter how their sympathies have previously guided them. If in this greater community a member disagrees with another, and the issue cannot be settled in peace and accommodation, there is no other arbitrament except fisticuffs in the streets of the World, and it is fortunate indeed if the passer-by does not receive a chance blow and join the mêlée.

It is the indefiniteness of international law and the absence of enforcing power that is the great danger to all mankind. There are men who are not sitting down in despair but who believe that there can be found a way to bring about community accommodation even as individual accommodation is superinduced by local law. They do not believe that the errors of vanity and egotism and the repudiation of the dangerous structures erected on that foundation is the end of the prospects of a governed world. These are the men of practicality and vision the world over. The structure they must build cannot be carelessly erected. Knowledge of the history of architecture is always in the equipment of the architect, even if his creation is a temple not made with hands.

To this end Professor Dickenson of the University of Michigan has given the readers who wish it a study of the relation of the States to one another in this loosely united world community. He has endeavored to keep in view the theory of equality of States as it has been evolved not alone in the postulation of international law as it is understood, but as it is "affected by common usage." Of course he uses "State" in the broad and national sense. The book was written during the progress of the war and its final chapter written on the questions which presented themselves at the Paris Conference forms a supplemental chapter of deep interest.

International law will get us nowhere except with the admission of this equality of nations before it. Professor Diskenson's work is satisfactorily comprehensive and both profound and elemental. It will take its place on the shelves of lawyers and historical students of scholarship and vision.

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